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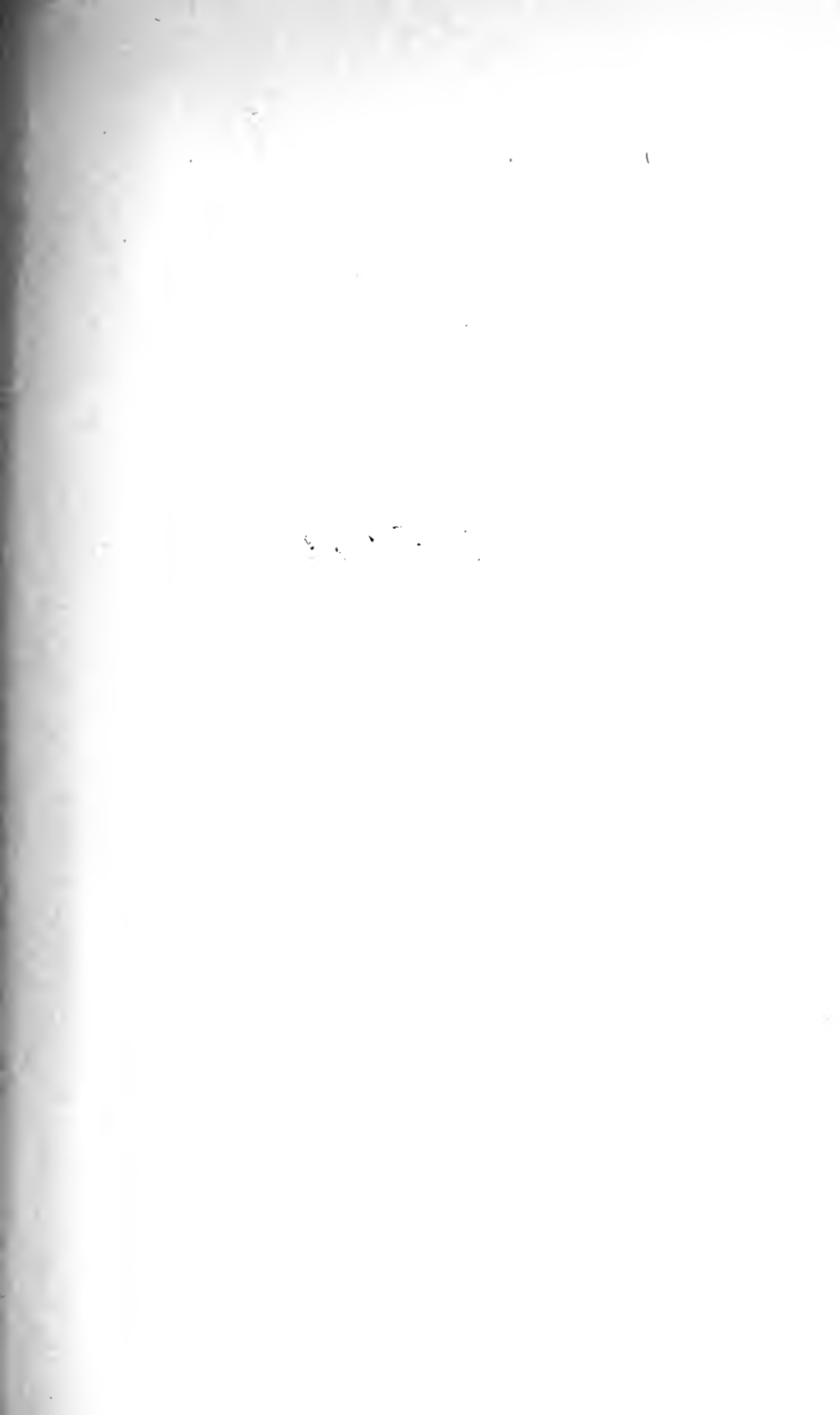
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No. 12873.

2680

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

See vol 2679

THE PLOMB TOOL COMPANY, a corporation,

Appellant,

vs.

LIONEL H. SANGER,

Appellee.

APPELLANT'S OPENING BRIEF.

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JUN 8 1951

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No. 12873.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE PLOMB TOOL COMPANY, a corporation,
Appellant,

vs.

LIONEL H. SANGER,
Appellee.

APPELLANT'S OPENING BRIEF.

Jurisdiction.

Pursuant to the provisions of Section 7 of the Service Extension Act of 1941 (55 Stat. 628, 50 U. S. C. App. Sec. 357), and Section 8 of the Selective Training and Service Act of 1940 (54 Stat. 890, 50 U. S. C. App. Sec. 308), as amended, appellee filed this action against appellant in the United States District Court for the Southern District of California, Central Division, on September 22, 1949, and the jurisdiction of that Court was based on the provisions contained in subdivision (e) of said Section 308 [R. 3; Find. I, R. 12]. After answer [R. 6] by appellant the cause was regularly tried before the Court, sitting without a jury, on December 19 and 20, 1950 [R. 11]; the District Court promulgated its findings of fact and conclusions of law on January

31, 1951 [R. 11], and its judgment for appellee on February 1, 1951 [R. 20].

Appellant, being aggrieved thereby, filed its notice of appeal in the District Court on February 5, 1951 [R. 22]. This Court has jurisdiction to review such decision pursuant to Section 1291 of the Judicial Code (62 Stat. 929, 28 U. S. C. Sec. 1291), and the venue is properly laid in the Ninth Circuit (62 Stat. 930, 28 U. S. C. Sec. 1294, Subdiv. 1).

Statement of the Case.

The controversy relates to the appellee's rights, as a veteran, to reinstatement in his asserted pre-war employment and to damages under the Selective Training and Service Act of 1940 and the Service Extension Act of 1941. The District Court's judgment [R. 20-21] ordered appellant to reinstate appellee for the period of one year and awarded appellee damages in the aggregate sum of \$102,185.25.

The basic questions are:

- (1) Whether appellee's claims for reinstatement and damages are barred by a statute of limitations;
- (2) Whether appellee's said claims are barred by laches and delay on his part;
- (3) Whether appellee's pre-war status with the appellant was that of an independent contractor;
- (4) Whether appellant's circumstances had so changed by the time appellee made application for reinstatement as to make it unreasonable to require appellant to restore appellee to his pre-war status; and

(5) Whether appellant fully satisfied any obligation it may have had to appellee by offering him “a position of like seniority, status and pay.”

An affirmative answer to any of these five questions would result, as a matter of law, in a decision in favor of appellant with reversal of the District Court’s judgment, *in toto*, as a necessary consequence. On the other hand, only a negative answer to all five of the foregoing issues will bring this Honorable Court to a consideration of the remaining basic issue. That question is:

(6) Whether the relief awarded appellee is excessive.

There is no substantial dispute as to the basic facts. They are all set forth in the Pre-Trial Stipulation dated September 18, 1950 [received in evidence as Plaintiff’s Exhibit 50 and comprising a part of the record on this appeal], and in the Supplemental Stipulation of Facts dated January 22, 1951 [comprising a part of the record on this appeal as Plaintiff’s Exhibit 51]. For the convenience of the Court, those two stipulations of facts are printed herewith as Appendices A and B, respectively, to this brief.

The following statement of the case is limited to those facts which are contained in the Pre-Trial Stipulation of Facts (App. A) and which the District Court found to be true [Find. XVII, R. 17], or which otherwise appear without controversy. Additional references are inserted to show where the record and exhibits cover and confirm matters contained in the stipulation.

Defendant and appellant, The Plomb Tool Company, is a California corporation engaged in the business of

manufacturing and selling hand tools and related items [Find. II, R. 12].

In November, 1942, and for approximately nine years prior thereto, plaintiff and appellee Lionel H. Sanger was authorized as a manufacturer's representative to sell appellant's merchandise on a commission basis in a specified territory, referred to generally as the "Kansas City territory" and comprising the states of Kansas, Iowa, Minnesota and Missouri; Nebraska (east of the extension of the Colorado eastern boundary); the counties of Brown, Beadle, Sanborn and Bonhemme in the State of South Dakota; and the City of Rock Island, Illinois [Find. III, R. 12; Stip. App. A, par. 3].

In November, 1942, appellee terminated his relationship with appellant in order to perform military training and service in the Armed Forces of the United States. On November 15, 1945, he was relieved from training and service and ordered released from active duty with a certificate of satisfactory service, and his terminal leave expired December 29, 1945 [Find. IV, R. 13; Stip. App. A, par. 4].

Immediately prior to appellee's entry upon active naval service, he was engaged in the sale of appellant's products on a commission basis as stated above pursuant to an agreement in writing [Stip. App. A, par. 5] between the appellee and appellant executed by appellee on January 18, 1941 [Ex. 15, printed herewith as Appendix C], as amended by a supplemental territorial agreement dated February 1, 1941 [Ex. 15, printed herewith as Appendix D], by an extension agreement dated December 8, 1941 [Ex. 16, printed herewith as Appendix E], and by sup-

plemental agreements dated respectively April 22, 1942, and September 23, 1942 [Exs. 16 and 19].

During the entire period covered by these written agreements, January 1, 1941, to November, 1942, the operating relationship between the parties was as follows [Stip. App. A, par. 6]:

Appellee, as a manufacturer's representative, was authorized to and did sell on a commission basis the products and merchandise of other manufacturers in addition to those of appellant, having represented six such others during the period in question [Exs. J-O, Q]. Between January 1, 1941, and November, 1942, appellee received \$26,072.16 from appellant as compensation for his sales of appellant's products, and during the same period he received \$20,244.49 from the other manufacturers as compensation for the sale of their products [Exs. J-O, Q; Find. XVI, R. 17]. In the conduct of his business appellee chose his own customers and determined his own itineraries in calling upon customers and prospective customers. He was requested by appellant to make reports concerning such itineraries and calls, but he did not follow any regular reporting plan as requested. Appellant from time to time furnished him with names of prospective customers in his territory from whom appellant received inquiries, and appellee reported to appellant regarding the same.

Appellant did not furnish appellee with an office and did not pay or reimburse him for any office expenses. Appellee paid his own expenses in connection with his activities as a manufacturer's representative in selling appellant's products and those of the

six other manufacturers represented by him [Exs. J-O], and in connection therewith he hired and paid with his own funds one assistant who was chosen by him [R. 73-74; Ex. C] and who acted pursuant to his direction [R. 75]. In January, 1941, appellant did pay appellee \$30 in partial reimbursement of his expenses in attending an automotive service industry convention. Appellant also made available to appellee a display truck owned by appellant [R. 58, 76], and in December, 1941, appellant paid appellee \$200 for repairs and tires for that truck to prepare it for appellee's use [R. 77, Ex. D].

Appellant made no deductions from commissions paid to appellee on account of social security taxes, old age benefits or unemployment insurance [R. 212-213].

Appellee made no investment in a stock of appellant's merchandise. In addition to its stock in Los Angeles, appellant maintained and paid the storage charges on a stock of merchandise in Kansas City from which customers in appellee's territory were supplied insofar as possible.

Appellant had the final authority on the extension of credit to customers and in specific instances from time to time appellant requested appellee to report to it upon his activities in collecting past due accounts.

In January, 1946, within ninety days after he was released from service, appellee made application to appellant for renewal of his pre-war status [R. 122, 177] as a manufacturer's representative, but appellant refused to renew such status [Find. V, R. 13; Stip. App. A, par. 8].

Prior to the time of such request, appellant had revised the geographical limits of its sales territories, and the State of Minnesota and all counties in the State of South Dakota had been eliminated from the "Kansas City territory" [R. 147, 152] in which appellee formerly had been authorized to sell appellant's products. At that time, the sales of appellant's products in such reduced territory were being handled by three full-time salesmen employed by appellant [R. 124, 128, 157], and they handled the sale of no products other than those of the appellant and its subsidiary corporations, P & C Hand Forged Tool Company and Penens Corporation. Appellant had theretofore determined [R. 119] that employment of full-time salesmen (as distinguished from manufacturers' representatives handling numerous lines) was necessary [R. 120, 130, 170] by reason of the increase in the volume of appellant's business, in the number of items manufactured by it and in the number of its customers [R. 140, 146, 167-169; Stip. App. A, par. 9].

When appellee applied for renewal of his pre-war status in January, 1946, appellant advised him that in its view he had been an independent contractor and hence had no statutory right to reinstatement [R. 142, 151-152, 217]. Nevertheless, because it respected appellee's ability as a salesman [R. 143, 217], appellant offered him a position as an employee on the same basis as then in effect for its other salesmen, selling exclusively the products of the appellant and its subsidiary corporations [R. 159], either (a) in his former "Kansas City territory," as such territory had been revised to that date [R. 123, 124, 129, 133, 178, 179, 186, 211], or (b) in the "Chicago territory" which then consisted of the State of Illinois and

portions of the States of Indiana, Michigan and Wisconsin [R. 124, 125, 133, 178, 179, 186]. Appellee was informed that if he accepted either of the foregoing proposals it would be necessary to work for appellant exclusively and to cease to represent other manufacturers as he had done prior to the war [R. 123, 124, 139]. Prior to his military service, appellee had handled products of appellant's subsidiary corporations only in cases where such subsidiaries had made tools for appellant on special order [Stip. App. A, par. 10].

At that time appellee advised appellant that he was unwilling to sever his connections with other manufacturers [R. 123, 126, 131, 132, 139] and was unwilling to accept either of the offered positions [R. 151; Stip. App. A, par. 11].

Thereafter in March, 1946, appellee took up with the Selective Service System the matter of his claim for reinstatement [Find. VII, R. 13]. The office of the Director of Selective Service for the State of California conferred and corresponded with appellant during the months of August, September and October, 1946, and appellant reiterated its refusal to renew appellee's pre-war status as a manufacturer's representative [Find. VIII, R. 14]. Appellee was immediately advised of this. The United States Attorney in Chicago, Illinois (to whom the claim had been transferred by the California Selective Service officials), did not file suit against appellant to enforce appellee's claim for reinstatement, and turned the file concerning such claim over to him in February, 1948 [Find. IX, R. 14], more than a year after appellant's last previous word regarding the claim.

During that month of February, 1948, appellee consulted the Chicago law firm of Arvey, Hodes & Mantynband regarding his claim for reinstatement [Find. X, R. 14]. They corresponded with appellant's attorneys, who in November, 1948, sent a letter to appellee's Chicago counsel, again rejecting appellee's claim; and appellee was advised of the contents of the letter on or before December 1, 1948 [Find. XI, R. 14].

Almost eight months later, an action was filed by appellee against appellant in the United States District Court for the Northern District of Illinois on July 22, 1949, to enforce appellee's asserted right to reinstatement, and that action was dismissed without prejudice on September 20, 1949, for want of jurisdiction over appellant in the Northern District of Illinois [Find. XII, R. 15]. This action was filed on September 22, 1949 [Find. XIII, R. 15].

From January, 1946, to September 22, 1949, the date of commencement of this action, appellant paid large and substantial sums of money to salesmen employees as compensation for selling its products in the territory formerly covered by appellee [Stip. App. A, par. 20]. The geographical limits of that "Kansas City territory" have been further revised from time to time since January, 1946, and each of the areas eliminated from time to time from said territory has been made a part of another of appellant's sales territories [Stip. App. A, par. 18]. At the present time three full-time salesmen employed by appellant are handling the sale of appellant's products in such territory. At all times since January, 1946, appellant has employed at least two, and as many as four salesmen to handle the sales of its products in that territory, and such

salesmen have handled no products other than those of appellant and its subsidiaries [Stip. App. A, par. 19].

During the period of approximately four years from his release from the armed forces in December, 1945, to January 23, 1950, appellee rendered services to ten different firms in the sale of their products and received from them \$91,549.05 as compensation for his personal services. He paid commissions to other salesmen in the amount of \$7,787.60, leaving him \$83,761.45 for the four-year period [Stip. App. A, par. 21; Ex. Q].

The District Court held that appellee's action was not barred by any statute of limitations [Concl. IV, R. 18]; that his claims were not barred by laches or delay [Find. XIV, R. 15]; that his pre-war status was not that of an independent contractor [Concl. I, R. 17]; that appellant's circumstances had not, and have not yet, so changed as to make it impossible or unreasonable to require it to restore appellee to his pre-war status [Concl. II, R. 17]; that appellant's offer to appellee did not satisfy its obligation to him within the meaning of the Selective Service Act [Concl. III, R. 18]; that appellee should have been reinstated in January, 1946, in his pre-war status as a manufacturer's representative, free to handle other lines, in his entire pre-war territory and at his pre-war commission rates of $12\frac{1}{2}\%$ and 8% (an average rate of 12.11% , although appellant in 1946 paid none of its sales representatives more than $7\frac{1}{2}\%$ [R. 201]); and that by reason of appellant's refusal so to reinstate him, appellee was

entitled to damages computed by applying appellee's average pre-war commission rate of 12.11% to all appellant's gross sales during the calendar year 1946 in appellee's former territory as the same was constituted in 1942, less the amount of compensation actually paid by appellant in 1946 to salesmen in such territory other than the man in charge of the territory whom appellant sought to replace, but without offset for appellee's earnings from other sources during the same period [Find. XV, R. 15-16]. This amounted to \$79,475.05, plus interest at 7% from January 1, 1947, making an aggregate award of \$102,185.25 [Concl. V, R. 18; Judgment, R. 20-21]. In addition, the District Court ordered appellant to reinstate appellee as a full-time employee for a period of one year as head of sales in the "Kansas City territory" as constituted in 1951 [Concl. VI, R. 18; Judgment, R. 20-21].

Specification of Errors.

1. The District Court erred as a matter of law in deciding that appellee's claims for reinstatement and damages were not barred by the statute of limitations, to wit, Section 338, subdivision 1, of the Code of Civil Procedure of the State of California.

2. The District Court erred in finding that appellee's claims for reinstatement and damages were not barred by laches and delay on his part, that delay in filing suit was contributed to by appellant and that appellant suffered no prejudice. The District Court's findings to that effect are not supported by any substantial evidence and are

contrary to the evidence, and its holding to that effect is contrary to law.

3. The District Court erred as a matter of law in concluding that appellee's pre-war status was not that of an independent contractor and that appellee left a "position in the employ" of appellant within the meaning of the Selective Service and Training Act. The District Court's holding to that effect is not supported by and is contrary to the uncontroverted evidence and the findings of fact, and is contrary to law.

4. The District Court erred in concluding that appellant's circumstances had not so changed by the time of appellee's application for reinstatement as to make it impossible or unreasonable to require appellant to restore appellee to his pre-war status. The conclusion to that effect is contrary to law and is not supported by the findings of fact or by any substantial evidence.

5. The District Court erred in concluding that appellant had not fully satisfied any obligation it may have had to appellee by offering him "a position of like seniority, status and pay" and that his rejection of such offer did not bar his claims to reinstatement and damages. Such conclusion is contrary to law and is not supported by the findings of fact or by any substantial evidence.

6. The relief awarded appellee by the District Court is excessive as a matter of law, even if any was justified, in following particulars:

(a) The District Court erred in finding that appellee's claim for damages was not barred by his

laches for any period prior to the commencement of this action on September 22, 1949, and that appellee was entitled to damages measured by his loss of earnings during the calendar year 1946.

(b) The District Court erred in awarding appellee damages measured by his loss of earnings for the entire calendar year 1946, in addition to ordering appellee reinstated by appellant and enjoining appellant from discharging him without cause for a period of one year following his reinstatement.

(c) The District Court erred in determining that appellee was entitled to damages measured by his asserted loss of earnings for the year 1946 computed on the basis of his pre-war commission rates of $12\frac{1}{2}\%$ and 8% , when all appellant's sales representatives were paid only $7\frac{1}{2}\%$ in 1946.

(d) The District Court erred in computing appellee's asserted loss of earnings for the year 1946 on the basis of appellee's former Kansas City territory as the same was constituted in 1942, rather than upon the basis of its reduced area as it existed in 1946.

(e) The District Court erred in refusing to allow appellant an offset for appellee's earnings from personal services rendered to others during the calendar year 1946.

SUMMARY OF ARGUMENT.

A. Appellee's Claims for Reinstatement and Damages Are Barred by the Statute of Limitations, to wit, Section 338, Subdivision 1, of the Code of Civil Procedure of the State of California.

Neither the Selective Service Act of 1940, nor the Service Extension Act of 1941, which established appellee's alleged rights, if any, prescribes a limitation period within which such rights must be asserted. In these circumstances the appropriate statute of limitations of the state in which the action is brought is applicable, under the Federal Rules of Decision Act, as amended in 1948 (28 U. S. C., Sec. 1652), both to the claim for damages and to the equitable claim for reinstatement.

The appropriate state statute of limitations is Section 338, subdivision 1, of the California Code of Civil Procedure, which provides a three-year limitation period for "an action upon a liability created by statute, other than a penalty or forfeiture." This statute has been specifically held applicable to actions in the federal courts to enforce statutory liability for damages created by federal statutes which prescribe no limitation period. It has also been specifically applied by the Supreme Court of California to claims for reinstatement based upon state statutes.

Since this action was commenced more than three years and seven months after the claim accrued by virtue of appellant's first refusal to reinstate appellee in January, 1946, the action is barred, and the District Court erred as a matter of law in deciding to the contrary.

B. Appellee's Claims Are Barred by Laches and Delay, Which Delay Is Not Attributable to Appellant and Which Resulted in Prejudice to Appellant.

As pointed out above, this action was not commenced until more than three years and seven months after the initial refusal by the appellant to reinstate appellee.

In January, 1946, when appellee first sought reinstatement, appellant advised him of its position that he had no re-employment rights under the Act, on the ground that he had been an independent contractor, and it steadfastly adhered to such position at all times thereafter. In the face of this, the burden was upon appellee to act with dispatch in order to preserve his rights, if any. This he did not do.

Even after the matter was turned back into the hands of appellee from the United States Attorney and the Office of the Director of Selective Service, appellee still delayed more than eighteen months before filing this action, and there was a delay of more than nine months after the last communication between appellee's private counsel in Chicago and appellant's attorneys in Los Angeles.

In the meantime, appellee sought and accepted other sales work, and his gross compensation for personal services to other manufacturers since December, 1945, amounted to more than \$116,000.00.

During all this time appellant has been employing other persons to sell its products in the territory covered by appellee prior to the war and has paid out large and substantial sums of money to such salesmen as compensation. Appellee's delay in bringing this action has obviously

operated to the prejudice of the appellant if it is required to pay twice for the services of selling products in the territory in question.

Therefore, this action is barred by appellee's laches and delay, and the District Court erred in finding to the contrary.

C. Appellee's Pre-War Status Was That of an Independent Contractor, and Hence He Is Not Entitled to Reinstatement or Damages Under the Selective Service and Training Act.

It is clearly established that independent contractors do not hold "a position in the employ of" a private employer within the meaning of the Selective Service and Training Act and do not have any reemployment rights whatsoever thereunder. The tests for determining the existence of an independent contractor status are the same under this act as for other purposes. The question must be considered in the light of the basic facts which reveal the fundamental nature of the relationship, and which demonstrate control, exercised or exercisable. Mere labels that the parties attach to a relationship are not such basic facts, do not necessarily depict the fundamental nature of the relationship and cannot overcome the impact of substantive rights.

On the basis of the stipulated facts and the uncontroverted evidence, appellee was an independent contractor. In essence, Mr. Sanger was conducting his own independent calling by representing various manufacturers (including appellant) as he wished, making his own op-

portunities for profit or loss, relying on his own skill and initiative, paying his own expenses, and determining his own hours of work, itineraries and methods of conducting business. He was free of control or supervision by the appellant, except as to the results accomplished.

D. Appellee Is Not Entitled to the Relief Granted, Even Assuming, Without Conceding, That He Left "A Position in the Employ of" Appellant Within the Meaning of the Act and That His Claims Are Not Wholly Barred by Limitations or Laches.

1. Appellant's Circumstances Had so Changed as to Make It Impossible or Unreasonable to Require It to Reinstate Appellee in His Exact Pre-war Position.

The Selective Service Act, Section 308(b), subdivision (B), specifically provides, and the courts have held, that a veteran is not entitled to reinstatement or damages where the employee's circumstances have so changed as to make such reinstatement impossible or unreasonable. The Act does not contemplate or require the freezing of an employer's operations, regardless of economic circumstances affecting the particular business, in order to preserve to the veteran his exact pre-war position. On the contrary, the veteran must take the position as he finds it upon his return from the service and accept the bitter with the sweet so long as he is treated equally with contemporary employees in relation to their relative standings at the time he departed for the service.

In this case, economic factors in the form of substantial growth of the appellant corporation, a great increase in the volume of its sales, adverse reaction of customers against manufacturers' representatives, and advice of a research organization, had all combined to dictate changes in the appellant's sales operation during appellee's military service. Accordingly, full-time salesmen had been substituted for manufacturers' representatives handling numerous lines, a uniform reduction had been made in the commission rate paid to all salesmen, and some changes had been made in the geographical areas of sales territories. In these circumstances it would be unreasonable within the meaning of the Selective Service Act to require appellee's reinstatement to his exact pre-war position, which was no longer available when he returned. Such reinstatement would necessarily disrupt appellant's selling methods and organization, and would give appellee a special, preferred status not enjoyed by salesmen who had remained with the company during the war period. It would, in effect, give him super-seniority. Therefore, appellee was entitled to demand no more than the post-war counterpart of his former position.

2. **Appellant Fully Satisfied Any Obligation It May Have Had to Appellee by Offering Him "a Position of Like Seniority, Status and Pay" Within the Meaning of the Act, and Appellee's Rejection of Such Offer Bars His Claims to Reinstatement and Damages.**

Section 308(b), subdivision (B), of the Act specifically provides, in the alternative, that an employer shall re-

store a veteran (1) to his position, or (2) to "a position of like seniority, status and pay." This is an unambiguous alternative, and the Act does not require that the employer offer the veteran his exact pre-war job even if it is available (which it was not in this case), so long as an equivalent offer is made.

Here the appellant offered appellee the current counterpart of his exact pre-war job on a basis which was equal in all respects to that enjoyed by other salesmen, who prior to the war had been manufacturers' representatives. That position was at the very minimum a position of "like seniority, status and pay." Appellee's refusal to accept this offer bars his claims for reinstatement and damages.

E. Even if Appellee Is Entitled to Any Relief, That Awarded by the District Court Is Excessive.

- 1. By Reason of His Delay in Filing Suit, Appellee Is Not Entitled to Recover Damages for Loss of Earnings for Any Period Prior to the Commencement of This Action on September 22, 1949.**

Although the veteran has not been guilty of such laches as will entirely bar his rights under the Act, even a short delay in filing suit precludes the award of any damages for the period prior to the commencement of the action. This is true, even though the delay is occasioned by the veteran's seeking the assistance of the Selective Service System or the United States Attorney, or by negotiations with the employer in the face of a definite refusal to rein-

state. To award damages for such an interim period would be unfair and unduly prejudicial to the employer.

In view of the extreme delay in this case, the District Court erred as a matter of law in holding that appellee's laches had not barred his claim for damages at least for the period prior to September 22, 1949, when this action was filed.

2. **Appellee Is Not Entitled to Damages Measured by His Loss of Earnings During the Entire Calendar Year 1946, in Addition to Reinstatement for One Year Subsequent to January 1, 1951.**

The Selective Service Act of 1940 guarantees a veteran only one year's reemployment. And while the courts have consistently awarded incidental damages as well as one year's reinstatement, we have found no case in which a court has awarded incidental damages for a period five years prior to the period in which reinstatement is ordered as was done here. Such damages are hardly incidental.

3. **Damages Measured by Loss of Earnings for 1946 Should Have Been Computed on the Basis of the Commission Rate of 7½% Actually in Effect for All Appellant's Sales Representatives During That Year.**

As pointed out above, the Selective Service Act does not freeze the employer's operation and guarantee to the veteran any rights beyond those enjoyed by contemporary employees who had attained at least equal seniority, status and pay with the veteran prior to his entry into the

service. The veteran is entitled to “step back on the escalator” at the point which he would have reached had he not left for service with the armed forces, and this is equally true whether the escalator has traveled up or down in the interim, so long as his relative place is preserved.

Appellant’s commission rate for all salesmen had been uniformly reduced, without exception, to $7\frac{1}{2}\%$ prior to appellee’s separation from the service. Yet the District Court held that appellee was entitled to recover his loss of earnings for 1946 computed on the basis of his pre-war commission rates of $12\frac{1}{2}\%$ and 8% , and the award was so computed. The obvious effect is to give appellee, at appellant’s expense, a “super-seniority” far beyond that contemplated by the Act.

4. Damages Measured by Loss of Earnings for 1946 Should Have Been Computed on the Basis of Sales in the Kansas City Territory as It Existed in 1946, Rather Than on the Basis of Its Larger Geographical Area as It Was Constituted in 1942.

Here again the District Court’s award places upon appellant an onus of “super-seniority” by measuring damages for loss of earnings in 1946 on the basis of appellee’s pre-war Kansas City territory, rather than on the smaller area comprising that territory in 1946.

The reduction in the area of the Kansas City territory took place in the ordinary course of appellant’s business, and was in no sense a discriminatory act directed at appellee. The Kansas City territory, as the same was con-

stituted in 1946 when appellee applied for reinstatement, produced a greater percentage of the company's total commission sales than did appellee's pre-war Kansas City territory in the years preceding the war. Thus, computing appellee's damages on the basis of gross sales in the Kansas City territory as constituted in 1946 would have amply afforded appellee the full measure of his rights, if any, and the District Court's award gave him more than the law requires or sanctions.

5. Any Damages Measured by Appellee's Loss of Earnings Should Have Been Made Subject to Offset for Amounts Earned by Appellee From Personal Services Rendered to Others During the Same Period.

The courts have uniformly and consistently required that a veteran's earnings from other employment during a particular period be offset against damages awarded the veteran under the Act. Yet, the District Court in this case refused to allow appellant an offset for appellees substantial earnings from other sources, and in effect provided him with compensation for his own full-time efforts as well as the full-time efforts of another man.

To allow appellee such double compensation is not only contrary to settled law, but is manifestly lacking in elemental principles of justice.

ARGUMENT.

A. Appellees Claims for Reinstatement and Damages Are Barred by the Statute of Limitations, to wit, Section 338, Subdivision 1, of the Code of Civil Procedure of the State of California.

The stipulated and uncontroverted evidence in this case shows, and the District Court found, (1) that in January, 1946, appellee asserted his alleged rights under the Selective Training and Service Act of 1940 and applied for reinstatement in his exact pre-war position, and (2) that appellant then and there unequivocally refused to reinstate him in accordance with his demand and advised him that it regarded him as having been an independent contractor and therefore as having no rights under the Selective Training and Service Act [Find. VI, R. 13; Stip. App. A, par. 8; R. 142, 151-152, 217]. Appellee did not file this action until September 22, 1949 [Find. XIII, R. 15], more than three years and seven months after that positive refusal by appellant.

In its answer [R. 10] appellant specifically pleaded Section 338, Subdivision 1, of the California Code of Civil Procedure (providing a three year limitation period for an action on a liability created by statute) as a bar to the action.

1. Appellee's Asserted Cause of Action Accrued in January, 1946, When He Demanded and Was Refused Reinstatement.

Clearly, appellant's unequivocal refusal to reinstate appellee and its adherence to its position that he had no rights under the Act, matured appellee's asserted cause of action, if any, not later than January 31, 1946.

In *Walsh v. Chicago Bridge & Iron Co.*, 90 Fed. Supp. 322, the United States District Court for the Northern District of Illinois stated at page 326:

“There is a controversy as to when the cause of action accrued. It is my opinion that the cause of action accrued on January 15, 1943, *when plaintiff demanded and was refused the reinstatement to which he thought he was entitled under the Selective Training and Service Act of 1940.** As a federal statute is involved, the question of when the cause of action thereunder accrues for purposes of the running of the prescribed limitations period (here the Illinois five-year period) is a matter of federal law. *Cope v. Anderson*, 331 U. S. 461, 464, 67 S. Ct. 1340, 91 L. Ed. 1602; *Rawlings v. Ray*, 312 U. S. 96, 98, 61 S. Ct. 473, 85 L. Ed. 605. The federal rule which has been applied consistently to questions concerning limitations of actions based on federal statutes is that the cause of action accrues from the very first moment that the right to bring court action arises. *Rawlings v. Ray*, 312 U. S. 96, 98, 61 S. Ct. 473, 85 L. Ed. 605.”

2. **Under the Federal Rules of Decision Act, the Appropriate State Statute of Limitations Is Applicable to an Action in a Federal Court to Enforce a Right to Reinstatement or Damages Created by a Federal Statute Which Does Not Prescribe a Limitation Period.**

The federal statute under which appellee asserts his claims does not prescribe a limitation period within which rights must be asserted thereunder. In this situation the appropriate state statute of limitations becomes applicable

*Emphasis here, as well as elsewhere in this brief, is supplied unless otherwise noted.

under the terms of the Federal Rules of Decision Act, 28 U. S. C., Sec. 1652 (formerly Revised Statutes Sec. 721, 28 U. S. C. 725), which provides:

“The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.”

The Federal Rules of Decision Act has been recently so applied in *Walsh v. Chicago Bridge & Iron Company*, 90 Fed. Supp. 322, *supra*, a case in which the court granted the defendant employer's motion for summary judgment in a veteran's action to recover damages under the reemployment provisions of the Selective Training and Service Act, on the ground that the action was barred by the Illinois Statute of Limitations. The court observed that no federal statute fixed the time within which such an action must be brought and said (p. 326):

“ . . . In these circumstances it is the applicable state statute of limitations which prescribes the time within which the rights must be enforced.

“This rule was established in *Campbell v. City of Haverhill*, 155 U. S. 610, 15 S. Ct. 217, 219, 39 L. Ed. 280. There the plaintiff, suing for infringement of a patent, sought to escape the state limitations statute on the ground that state statutes ‘have no application to causes of action created by congressional legislation and enforceable only in the federal courts.’ The Supreme Court held, however, that Federal courts were required by the Rules of Decision Act, 28 U. S. C. A. §1652, to follow the applicable state statutes.”

The Federal Rules of Decision Act has been held to require the application of state statutes of limitation to causes of action based on federal statutes in many other circumstances.

In *Campbell v. City of Haverhill*, 155 U. S. 610, an action for patent infringement originating in a federal court in Massachusetts was held to be barred by the Massachusetts statute of limitations. The Supreme Court first pointed out that the limitation provision existing in the Patent Act had expired, and then said at page 614:

“The argument in favor of the applicability of state statutes is based upon Revised Statutes, § 721, providing that ‘the laws of the several States, except, etc. . . . shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.’ That this section embraces the statutes of limitations of the several States has been decided by this court in a large number of cases, which are collated in its opinion in *Bauserman v. Blunt*, 147 U. S. 647. To the same effect are the still later cases of *Metcalf v. Watertown*, 153 U. S. 671, and *Balkam v. Woodstock Iron Co.*, 154 U. S. 177. Indeed, to no class of state legislation has the above provision been more steadfastly and consistently applied than to statutes prescribing the time within which actions shall be brought within its jurisdiction.”

In *Abrams v. San Joaquin Cotton Oil Company* (S. D. Cal.), 46 Fed. Supp. 969, the late Judge O'Connor held that the California statute of limitations (Code of Civ. Proc., Sec. 338(1)) was applicable to an action for un-

paid overtime compensation and liquidated damages under the Fair Labor Standards Act, saying at page 975:

“It is conceded by both the plaintiffs and the defendant, and is also apparent from the Fair Labor Standards Act, that a statute of limitations has not been prescribed setting a time limit in which an action can be maintained under the Act. In this event Section 725, U. S. C. A., Title 28, provides: ‘The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.’ Therefore, recourse must be made to the statute of limitations set forth in the California Code of Civil Procedure.”

To the same effect is:

Lorenzetti v. American Trust Company (N. D. Cal.), 45 Fed. Supp. 128.

On the same basis, state statutes of limitations have been held applicable to other actions having their origin in federal statutes, such as actions for treble damages under the Sherman and Clayton Acts. *Chattanooga Foundry and Pipe Works v. Atlanta*, 203 U. S. 390; *Williamson v. Columbia Gas and Electric Corporation* (3 Cir.), 110 F. 2d 15, cert. denied, 310 U. S. 639; *Barnes Coal Corporation v. Retail Coal Merchants Association* (E. D. Va.), 43 Fed. Supp. 309.

Even if appellee's claim for reinstatement be regarded as a suit in equity, such claim is barred by the appropriate state statute of limitations under the present provisions of

the Rules of Decision Act. Some cases decided under the old Federal Rules of Decision Act (formerly 28 U. S. C. Sec. 725), prior to its amendment in 1948, held that state statutes of limitation were not applicable to suits in equity in the federal courts because that Act, as it then stood, provided that state laws should be regarded as rules of decision in the federal courts only in actions "*at common law.*" Such cases are no longer in point. The old Rules of Decision Act referred to above was repealed by the Act of June 25, 1948, 62 Stat. 992, effective Sept. 1, 1948, and was replaced by the new Federal Rules of Decision Act (28 U. S. C. Sec. 1652) which applies to "*civil actions*" in the courts of the United States rather than merely to actions "*at common law.*" Regarding this change, the reviser's notes state:

" 'Civil action' was substituted for 'trials at common law' to clarify the meaning of the Rules of Decision Act in the light of the Federal Rules of Civil Procedure. Such act has been held to apply to suits in equity." (Title 28, U. S. Code Cong. Service, 80th Congress, 2nd Session, at page 1868.)

Thus, there is now no distinction between actions at law and suits in equity insofar as applicability of state statutes of limitations is concerned, and the authorities cited herein apply with equal force to appellee's claims both for damages and for reinstatement.

There remains the question as to what is the appropriate state statute of limitations applicable to this action.

3. Section 338, Subdivision 1, of the California Code of Civil Procedure, Prescribing a Three-year Limitation Period for "an Action Upon a Liability Created by Statute, Other Than a Penalty or Forfeiture," Is Applicable to This Case as an Action for Damages and as an Action for Reinstatement.

The federal courts have specifically applied Section 338, Subdivision 1, as providing a limitation period of three years within which a statutory liability created by a federal statute must be enforced.

In *Abrams v. San Joaquin Cotton Oil Co.* (S. D. Cal.), 46 Fed. Supp. 969 and in *Lorenzetti v. American Trust Company* (N. D. Cal.), 45 Fed. Supp. 128, both *supra*, Section 338, Subdivision 1 of the California Code of Civil Procedure was held to be the appropriate statute of limitations applicable to an action to enforce the statutory liability created by the Fair Labor Standards Act.

In addition to the above federal cases which hold that Section 338, Subdivision 1, applies to damage actions based on a federal statutory right, the California courts have held that this statute of limitations applies to an action to compel reinstatement in a position on the basis of a statutory right. In *Harby v. Board of Education*, 2 Cal. App. 418, 83 Pac. 1081, the petitioner sought reinstatement as vice-principal of a school by way of mandamus against the Board of Education. The Political Code of California provides for such reinstatement where there is a discharge without cause. The California court reasoned that the liability was based upon a statute and held that

Section 338, Subdivision 1 of the California Code of Civil Procedure was applicable as a bar to the enforcement of petitioner's right.

In *Jones v. Board of Police Commissioners*, 141 Cal. 96, 74 Pac. 696, the petitioner sought mandamus to compel the California Police Commissioners to admit the petitioner to a position as a policeman. The California Supreme Court held that Section 338, Subdivision 1, of the California Code of Civil Procedure was a bar to the action.

Thus it is conclusively established that the California courts apply Section 338, Subdivision 1, to equitable actions, and more particularly to equitable actions for reinstatement in a position based upon a statutory right.

4. Negotiations for the Adjustment of a Controversy Do Not Toll the Statute of Limitations.

Although negotiations for an amicable settlement were conducted on behalf of appellee on two subsequent occasions by the Selective Service System and his private Chicago counsel, these transactions cannot operate to toll the statute of limitations. Appellant at no time either departed from its flat refusal to reinstate appellee to his exact pre-war position or altered its position that appellee did not have any rights under the Selective Training and Service Act.

The veterans reemployment cases have held that utilizing the services of the Selective Service System and the United States Attorney, as well as direct negotiations with an employer, do not preclude laches from attaching. *Kay*

v. General Cable Corp. (D. N. J.), 59 Fed. Supp. 358, 360, affirmed on rehearing, 63 Fed. Supp. 791; and *Noble v. International Nickel Co., Inc.* (S. D. W. Va.), 77 Fed. Supp. 352, 354. If such negotiations do not prevent laches, then even more clearly a statute of limitations, a definite statute of repose, is not tolled.

Moreover, it is firmly established general law that statutes of limitations are not tolled by negotiations looking toward a settlement of a controversy.

“The mere pendency of negotiations for the adjustment of a controversy does not suspend the statutory prescription against an action on the claim involved.”

54 C. J. S. 284 (Limitations of Actions, §250).

See, also: *Schwing Lumber & Shingle Co. v. Peterman* 140 La. 71, 72 So. 812; *Taylor v. Harmon*, 120 Okla. 145, 250 Pac. 887.

In summation, Section 338, Subdivision 1, prescribes a limitation period of three years for both an action for reinstatement and an action for damages based upon a statutory right; the Federal Rules of Decision Act requires that it be applied to statutory rights created by the Selective Service Act; and appellee's action, not having been commenced within such three-year period, is barred.

B. Appellee's Claims Are Barred by Laches and Delay.

Without in any way retreating from our position that this action is completely barred by the state statute of limitations even if it be regarded as a suit in equity, we submit that in any event appellee was guilty of laches in delaying more than three years and seven months following appellant's definite refusal to reinstate him, before commencing this action.

During March 1946, after appellant's initial refusal in January, appellee took up with the Selective Service System the matter of his claim for reinstatement [Ex. 33]. He was informed by the office of the Director of Selective Service for California that it had conferred and corresponded with appellant during the months of August, September and October, 1946, regarding his claim, and that appellant still refused to renew his pre-war status [Find. VII and VIII, R. 13-14; Exs. 35, 36, 37]. This additional definite refusal by appellant occurred at least two years and eleven months before this action was commenced on September 22, 1949.

In December 1946, appellee talked to Messrs. Pendleton and Kerr, president and vice-president of appellant, in Atlantic City, who reiterated the company's refusal to reinstate him on any basis other than as a full-time employee [R. 134-135, 179-180]. Fourteen months then passed without further word from appellee.

The United States Attorney in Chicago did not file suit on behalf of appellee to enforce his claim for reinstatement, and, at the request of appellee, turned the file concerning such claim over to appellee during the month of February, 1948 [Find. IX, R. 14]. From this point

appellee delayed one year and seven months before bringing this action.

Appellee then consulted the law firm of Arvey, Hodes & Mantynband in Chicago, and on February 28, 1948, they wrote appellant's attorneys asserting appellee's claim [Find. X, R. 14; Ex. 38]. During November 1948, the law firm of O'Melveny & Myers, as attorneys for appellant, wrote to Messrs. Arvey, Hodes & Mantynband again rejecting the claim on behalf of appellant, and this refusal was made known to appellee on or before December 1, 1948 [Find. XI, R. 14; Ex. 46]. Still, appellee delayed more than nine months before commencing this action.

This is hardly the diligence in protecting one's rights which courts of equity require of those who seek their aid.

1. Veterans' Claims Under the Selective Training and Service Act Have Been Held to Be Barred by Laches and Delay Although the Delay Was Substantially Shorter Than That in This Case.

Appellee's delay in bringing this action not only exceeds the period specified in the applicable state statute of limitations but is greatly in excess of periods of delay which have been held in other cases to bar veterans' rights under the Selective Training and Service Act, purely on the ground of laches.

In *Cummings v. Hubbell* (W. D. Pa.), 76 Fed. Supp. 453, a delay of 23 months after the veteran's discharge from service before commencing the action was held to constitute laches and to bar the veteran's rights under the Selective Training and Service Act. In *Caldwell v. Harman* (S. D. Cal.), 12 C. C. H. Labor cases, Par. 63,671, a veteran's action was held barred by laches after

a delay of eleven months. In *Daniels v. Barfield* (E. D. Pa.), 77 Fed. Supp. 283, an action was held barred by laches where the veteran had been reemployed and then discharged and where he delayed seven months after his discharge before demanding and commencing suit for reinstatement and damages. The court there said at page 285:

“The very essence of this provision of the Act is that of promptness. Delay not only deprives the Court of the opportunity of rendering prompt aid to those entitled to it but places the defendant at a disadvantage in being lulled into a false sense of security. I am of the opinion that the delay on the part of the plaintiff was unreasonable and amounts to acquiescence in the action of the defendants and accordingly results in a forfeiture of his right to reinstatement and of the incidental right to demand compensation for loss of wages and benefits.”

2. **Even Before the Amendment of the Rules of Decision Act When the Federal Courts Were Not Bound by State Statutes of Limitations in Purely Equitable Actions to Enforce Federal Rights, Federal Courts Used the State Limitation Period as a Guide in Applying the Doctrine of Laches.**

This rule is well stated in *Russell v. Todd*, 309 U. S. 280, where the United States Supreme Court said at page 293:

“We take it that in the absence of a controlling act of Congress federal courts of equity, in enforcing rights arising under statutes of the United States, will without reference to the Rules of Decision Act, adopt and apply local statutes of limitations which are applied to like causes of action by the state courts. Cf. *Mason v. U. S.*, 260 U. S. 535, 67 L. ed. 396, 43 S. Ct. 200; *Jackson County v. U. S.* No. 14, this

term [308 U. S. 343, *ante*, 313, 60 S. Ct. 285]. In thus giving effect to state statutes of limitations as a substitute or supplement for the equitable doctrine of laches, it must appear with reasonable certainty that there is a state statute applicable to like causes of action.”

Here there is no question but that there is a state statute applicable to like causes of action. As pointed out above (under Point A, 3), Section 338, subdivision 1 of the California Code of Civil Procedure has been applied by the California courts to equitable reinstatement proceedings which are indistinguishable in principle from this action for reinstatement under the Selective Service Act. *Jones v. Board of Police Commissioners*, 141 Cal. 96, 74 Pac. 696; *Harby v. Board of Education*, 2 Cal. App. 418, 83 Pac. 1081, both *supra*.

3. Appellant Did Not Contribute to Appellee's Delay in Commencing This Action.

The District Court found as a fact that appellant contributed to the delay in filing this action [Find. XIV, R. 15].

The only conceivable evidentiary support for the finding that appellant contributed to the delay lies in the correspondence exchanged between the respective attorneys for the parties during 1948 [Exs. 38-47]. The most that can be said of this correspondence is that appellant, through its counsel, expressed willingness to consider an amicable adjustment of the controversy [Exs. 39, 40], while maintaining its original position that appellee was not entitled to the protection of the Selective Service Act because he had been an independent contractor [Exs. 40, 46]. At no time did appellant or its counsel request appel-

lee to delay filing his action; and the long period that elapsed between February 28, 1948, when appellee's attorneys initiated the correspondence and November 4, 1948, when appellant's final position was stated, could hardly have served to encourage appellee in the belief that the matter was about to be settled. In any event, it in no way prevented him from filing his action, which he did not do until more than ten months after the last letter from appellant's counsel.

Appellee's long delay in filing this action cannot be excused by his long continued and fruitless negotiations with appellant (see *Kay v. General Cable Corp.* (D. N. J.), 63 Fed. Supp. 791, 794), or by his previous referral of his claim to the Selective Service Authorities (*Noble v. International Nickel Co., Inc.* (S. D. W. Va.), 77 Fed. Supp. 352, 355).

The true reason for appellee's delay in filing his action is revealed by the evidence, and it has nothing whatsoever to do with any action or inaction on the part of appellant. Exhibit Q shows that appellee's earnings from his representation of other manufacturers in the post-war period maintained a level during 1946 and 1947 considerably higher than his earnings from all sources, including the sale of appellant's products, during 1941 and 1942. During 1946 and 1947 appellee was doing well enough financially that he had little real interest in securing reinstatement as a sales representative for Plomb Tool Company. Exhibit Q reveals further, however, that in 1948, appellee's earnings from other sources took a substantial drop, and it will be recalled that it was during that year when his Chicago attorneys had the correspondence with appellant's counsel. In 1949, however, appellee's earnings from other sources fell far below their level in the im-

mediate post-war years, and it was then and then only that appellee felt impelled for the first time to seek the assistance of the courts in enforcing his asserted right to reinstatement in which he had theretofore shown only an intermittent interest.

4. Appellant Suffered Prejudice as a Result of the Delay.

The District Court's finding that appellant suffered no prejudice by reason of any delay [Find. XIV, R. 15] is completely unsupported by any evidence and is contrary to the uncontradicted evidence that at all times since January, 1946, appellant has employed not less than two and as many as four salesmen to handle the sale of its products in the territory claimed by appellee [Stip. App. A, par. 19]. From January, 1946, through September, 1949, when this action was commenced, appellant paid such salesmen more than \$140,000 in commissions on sales in that territory [Ex. 49]. Beyond any doubt this shows substantial prejudice to appellant by reason of the delay, for the effect of the award of damages to appellee is to require appellant to pay double compensation (and more by reason of the higher commission rate on which appellee's award is based) for the sales of its products made in that territory.

Appellee's gross earnings of more than \$116,000 [Ex. Q] from other sources since January, 1946, show the lack of equity in the stale claim now asserted by him. We submit that his action is barred not only by the statute of limitations, but also by his laches and delay to the prejudice of appellant.

C. Appellee's Pre-War Status Was That of an Independent Contractor and Hence He Is Not Entitled to Reinstatement or Damages Under the Selective Service and Training Act.

1. Independent Contractors Are Not Protected by the Selective Training and Service Act.

The term "a position . . . in the employ of an employer" as used in the Selective Training and Service Act does not include within its orbit the status of an independent contractor; and the courts have uniformly held that an independent contractor has no right to reinstatement or damages under the act.

In *Brown v. Luster* (9 Cir.), 165 F. 2d 181, an action for reinstatement under the Selective Training and Service Act, this Honorable Court said at page 184:

"We agree with the District Court that an independent contractor does not come within the interpretation of the Act. An independent contractor, as the word connotes, is more or less in the same category as a person in business for himself who because of his ability to produce without the control or direction of another is not subjected to the usual and common restrictions and regulations applicable to the ordinary employee . . .

"It is clear, too, that though the legislation in question is to be liberally construed for the benefit of the veteran it aims to apply its provisions to the existing relationship before induction and not to impose upon one person a liability toward another to whom there was no previous liability. Cf. *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U. S. 275, 285, 65 S. Ct. 1105, 90 L. Ed. 1230, 167 A. L. R. 110 . . .

“Whether we are dealing with cases involving the responsibility of a person for the acts of those under his control or with remedial or regulatory statutes, the basic distinctions between an employee and an independent contractor are the same.

“In *United States v. Silk*, heard together with *Harrison, Collector of Internal Revenue v. Greyvan Lines, Inc.*, 331 U. S. 704, 67 S. Ct. 1463, the Supreme Court laid down certain tests for this distinction. In *Henry Broderick, Inc. v. Clark Squire* opinion filed October 10, 1947, 9 Cir., 163 F. 2d 980, 982 . . . we . . . said ‘. . . These tests included degree of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation.’

“We might add to this non-exhaustive list of tests: lack of control or supervision, the independent contractor representing the will of an employer only as to the result to be accomplished, freedom to determine one’s own hours of work and to engage in other professional activity, and ‘depend [ency] upon [one’s] own initiative, judgment and energy for . . . success,’ (*Silk* case, *supra* [331 U. S. 704, 67 S. Ct. 1469])—all of which factors were enjoyed by appellant.”

2. Appellee Was an Independent Contractor.

As stated in the foregoing quotation from *Brown v. Luster*, the same basic tests are applied in determining whether a veteran is an independent contractor or an employee within the meaning of the Selective Service Act as are applied in distinguishing between an employee and an independent contractor for other purposes. We earnestly submit that, in the light of those tests, the factual elements of appellee’s pre-war relationship with appellant, *e. g.*, his simultaneous representation of six other manufacturers,

his payment of his own expenses, his employment of his own assistants, his selection of his own itineraries, and his freedom from appellant's control as to the means and methods of conducting his selling activities, show conclusively that he was an independent contractor.

The most factually comparable case which our research has revealed is the case of *Brown v. Luster*, 165 F. 2d 181, *supra*, decided by this Honorable Court on December 26, 1947. The striking parallel between the facts of that case and those here present prompts setting out the following graphic comparison:

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Instant Case

1. The veteran sold furniture for the defendant in a specified territory under an oral agreement which was terminable at will by either party.

2. The veteran was paid on a commission basis, the rates being $7\frac{1}{2}$ per cent on lamps and 6 per cent on the sale of occasional furniture.

3. The veteran was free to solicit orders from whatever customers he selected.

1. Appellee sold tools for the appellant in a specified territory under a written contract which was terminable upon thirty days' written notice by either party [Ex. 15, App. B].

2. Appellee was paid on a commission basis, the rates being $12\frac{1}{2}$ per cent on tools and 8 per cent on so-called "buy-outs" [Ex. 15, App. C].

3. Appellee solicited orders from whatever customers he selected [Stip. App. A, par. 6(e)].

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4. The veteran determined his own hours and places of work, his own schedules, sales routes and itineraries.

5. The veteran employed whatever method of salesmanship he desired.

6. The veteran was not required to spend full time or any particular time in selling defendant's products and was not prohibited from simultaneously selling other articles manufactured by other companies, although he had not done so for several months prior to his induction.

Instant Case

4. Appellee determined his own hours and places of work and itineraries and did not follow any regular reporting plan as requested by appellant [Stip. App. A, par. 6(e)].

5. Appellee was free to select and use his own methods and means of obtaining his results [Stip. App. A, par. 6(e)].

6. Appellee was free to, and did, represent other manufacturers by simultaneously selling their products along with those of appellant, and during the whole two years immediately preceding his entry into the armed services he represented six other such manufacturers and received in excess of 43 per cent of his total gross income for the years 1941 and 1942 from such other manufacturers [Stip. App. A, par. 6(b), (c)].

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Instant Case

7. The veteran paid all of his own expenses incurred in the making of sales and solicitation of orders, including travel expenses, averaging between \$50 and \$75 per week.

8.

9. Defendant's office was not the headquarters of the veteran and the veteran was not required to be at defendant's office for any regular or scheduled sales meetings but usually visited the defendant's place of business each weekend.

7. Appellee paid all of his own expenses incurred in the making of sales and solicitation of orders, including expenses which averaged approximately \$200 per week for the years 1941 and 1942, with the exception of \$30 which appellant paid appellee in partial reimbursement of his expenses in attending an automotive service industry convention and \$200 which appellant paid appellee for the initial repairs and tires for a truck which appellant made available to appellee [Stip. App. A, par. 6(d); Exs. J-O].

8. Appellee hired and paid with his own funds one assistant who was chosen by him and who acted pursuant to his directions [Stip. App. A, par. 6(d)].

9. Appellant did not furnish appellee with an office and did not pay or reimburse appellee for any office expenses [Stip. App. A, par. 6(a)].

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10. There was no sales quota imposed upon the veteran while acting as a salesman for the defendant.

11. Defendant did not withhold any Social Security, Unemployment Compensation or other withholding tax from the veteran's commissions.

12. The defendant had the final authority in accepting and shipping orders taken by the veteran.

Instant Case

10. There was no sales quota imposed upon the appellee while acting as a salesman for appellant, although the appellant did from time to time in memorandum form publish the relative sales standings of its various manufacturers' representatives [Exs. 2, 3, 4, 14].

11. Appellant made no deduction from commissions paid or payable to appellee on account of Social Security taxes, Old Age Benefits or Unemployment Insurance [Stip. App. A, par. 6(f)].

12. Appellant had the final authority on extension of credit to customers and in specific instances from time to time appellant requested appellee to report to it upon his activities in collecting past due accounts [Stip. App. A, par. 6(h)].

In *Brown v. Luster, supra*, this Honorable Court, after reviewing the above evidence, held that the veteran was not within the protection of the Selective Service Act, saying at page 185:

“There is substantial evidence to support the findings of the Court and we agree that they were sufficient to bottom the conclusion that appellant exercised his own discretion with complete freedom in performing his services; that appellees exercised no direction or control over the manner in which the appellant chose to perform the work; and that appellant was responsible to appellees only as to the results obtained. Tested by these and the requirements of the cases enumerated to distinguish between an ‘employee’ and an ‘independent contractor,’ these facts firmly establish the appellant to be an independent contractor and that he did not hold a ‘position’ in the employ of the appellees.”

Other cases in which commission salesmen were held on closely similar facts to be independent contractors, and hence not entitled to reinstatement under the Act, are *Rosenbaum v. Ceco Steel Products Corporation* (D. C. D. C.), 84 Fed. Supp. 954 and *Frank v. Tru-Vue, Inc.* (S. D. Ill.), 65 Fed. Supp. 220. The veterans in both cases, like appellee here, were sales representatives authorized to operate in specified territories, who were paid on a commission basis, who handled the sale of other lines of products in addition to those of the defendants, and who were free to determine their own hours of work and itineraries and to solicit orders in whatever manner and from whatever customers they chose.

The facts in the instant case, as outlined above in connection with those of *Brown v. Luster*, establish with

equal firmness that Mr. Sanger was an independent contractor and did not hold a position in the employ of appellant. Such facts, established without contradiction by the stipulation [Ex. 50; App. A] and the evidence adduced at the trial, are all the basic facts which illuminate the fundamental nature of the relationship between the parties. There is here no question of conflicting evidence resolved by a trial court's finding, for all these basic facts were found by the District Court to be true [Find. XVII, R. 17]. Its conclusion that appellee was not an independent contractor [Concl. I, R. 17] is not supported by the findings or the evidence and is erroneous as a matter of law. This Court has not hesitated to reverse similar decisions where an independent contractor was erroneously held to be an employee (*Henry Broderick, Inc. v. Squire* (9 Cir.), 163 F. 2d 980), and we submit that the same should be done here.

3. "Labels" Which the Parties Have Used and Miscellaneous Incidents of the Relationship Do Not Vary the Impact of the Basic Facts Which Control the Substantive Rights of the Parties.

The basic facts outlined graphically above conclusively demonstrate that appellee's pre-war status was that of an independent contractor. In an effort to vary and camouflage the impact of these basic facts, there were introduced in evidence on behalf of appellee a series of documents and incidental matters which apparently were thought to indicate an employer-employee relationship. A series of documents was introduced in which appellee was referred to as a "salesman" [Exs. 2, 3, 4, 5, 7, 9, 10, 12, 14 and 20]. But the term "salesman" deals only with function and has no bearing upon the nature of the relationship between the salesman and the party whose goods are sold. It connotes

neither an employee nor an independent contractor status. Webster's New International Dictionary, 2d Ed., defines "salesman" as:

"one whose occupation is to sell, as goods, merchandise, land, securities, transportation, etc., either in a store or within a given territory, specif., a commercial traveler."

Nor is there significance in the fact that, in some of these documents [Exs. 2, 3, 4 and 14], the appellee's sales record was compared with that of other persons, also referred to as "salesmen." The fact is that such other persons at that time (1938-1940) were not employees, but on the contrary as shown by the evidence, were in an identical position with appellee and like appellee were independent contractors [R 161-162, 165-166, 168, 212-213].

Correspondence between the company and appellee contains various offhand references such as "Plomb people" [Ex. 6] and "your company" [Ex. 11],—references which are indicative only of the fact that there was a relationship between him and the company, but not of the nature of that relationship. The evidence reveals other incidental trivia:—in 1939 appellee won a watch in a sales contest [Exs. 9, 10]; he was awarded service pins [Exs. 13, 18] which were given to anyone, including directors of the corporation, having more than two years of connection with the company [R. 176-177, 184]; he made a donation for the employees' club house [Ex. 17]; a letter from appellee after he joined the navy was printed in appellant's company paper, the "Anvil Chorus" [Exs. 26, 27]; and appellant furnished appellee with business cards bearing the company name [Ex. 32]. (The insignificance of the latter item is shown by the fact that similar cards were furnished

to the persons held to be independent contractors in *Rosenbaum v. Ceco Steel Products Co.*, 84 Fed. Supp. 954, and in *Frank v. Tru-Vue, Inc.*, 65 Fed. Supp. 220, both *supra*.)

At the time of appellee's entry into the armed services a letter recommending him for a navy commission was written by Morris Pendleton (who was president of appellant, but who did not sign the letter as such) in which he referred to appellee as having been "district manager" for the company [Ex. 22]. And in a similar letter by Dillon Stevens (also an officer of appellant, but who did not sign in that capacity) it was said that appellee "has been employed by the Plomb Tool Company" [Ex. 24]. Such off-the-cuff references were obviously made informally and at a time when the exact legal nature of the relationship between the parties was not being considered and was of no immediate importance.

It is illuminating to compare such evidence with the acts and statements of the parties when they really considered the legal nature of their relationship at times when it was important.

First of all, the written contract between the parties dated January 18, 1941 [Ex. 15, App. C], which was in effect when appellee went into the navy, contained in Paragraph 11 the following specific provision:

"11. Nothing herein contained shall be construed to create any relationship of employer and employee between the Company and me or to vest in me any power or authority to engage employees of any kind on behalf of the Company or to obligate the Company

in any manner, or to vest in the Company any right or power to control the means or manner of accomplishing the results herein contemplated. It is distinctly understood that in order to achieve said results I am to select and use my own methods and means, including the personnel of my assistants and employees, if any, to operate hereunder at my own risk and expense, and to hold the Company free and harmless from any and all liability resulting from my operations hereunder; provided, however, that said work shall be done in such manner as will be consistent with the achievement of the result contracted for, at the time or times herein specified.”

In the supplemental agreement dated December 8, 1941, extending that contract for another year, it was referred to as the “contract . . . under which you sell our tools as an independent contractor . . .” [Ex. 16, App. E.]

We recognize, of course, that such contractual provisions would not be controlling if in actual practice appellant had exercised control over the manner or means of appellee’s achievement of the contemplated results and if the parties had in fact operated on an employer-employee basis. But the facts show that the parties actually operated in accordance with the quoted clause from the contract. We have already pointed out in the preceding section of this brief the basic facts of the relationship which clearly indicate that appellee operated as an independent contractor. And other acts of the parties lead

to the same conclusion. For example: appellee in his federal income tax returns both before and after the war variously described the nature of his business as “manufacturers’ agent” [Exs. J, M, N and O] and as “manufacturers’ representative” [Exs. K and L], listing his income received from the several manufacturers represented by him and lumping together all his deductible business expenses. His business stationery had printed at the top “Lionel H. Sanger,” his Kansas City address and telephone, and at the bottom was the printed legend “Serving the Automotive and Industrial Jobber” [see Exs. 23, H and R]. Other business stationery used by appellee [exemplified by Ex. E] had the name “L. H. Sanger” printed at the top of the letterhead of Kansas City Warehouse Service Company in which he at one time had a financial interest [R. 78-79] and where he had his desk and received his mail [R. 79-82].

Appellee’s own view of his independent status is further illustrated by his vociferous objections when appellant advised him on two occasions of its desire to move the location of its warehouse facilities in Kansas City [Exs. A, B, C, F and H]. The tenor of appellee’s replies to such advice and the fact that it was necessary for the president of appellant to bargain with him in order to get him to hire a much needed assistant [Ex. B], go far toward convincing that theirs was not a true employer-employee relationship or anything remotely akin to it.

In 1942, appellant advised appellee that it could not request draft deferment for him because he was an inde-

pendent contractor [Ex. 21]. And appellee apparently specifically recognized that he was an independent contractor and not entitled to reinstatement under the Act when he wrote appellant late in 1942 requesting that he be allowed to hire a man to continue serving his territory during his absence in the armed services in order that he could carry on after the war was over [Ex. 23]. Appellant evidenced a similar view of the relationship when it answered appellee's letter stating that the disposition of the territory would be up to the Plomb Tool Company at the end of the war [Ex. 25].

A consideration of the incidental and for the most part insignificant facts relied upon by appellee, particularly when viewed alongside the other facts outlined above which bear even more strongly the other way, cannot vary or overshadow the basic facts of the relationship, such as appellant's lack of control or supervision, appellee's freedom to determine his hours of work and his methods and means of accomplishing the result, his dependency upon his own initiative, judgment and energy for success, his opportunities for profit or loss, his freedom to take advantage of other professional opportunities by the representation of other manufacturers, and his employment of his own assistants.

Appellee was an independent contractor and the District Court erred as a matter of law in concluding to the contrary.

D. Appellee Is Not Entitled to Any Relief, Even Assuming, Without Conceding, That He Left a Position in the Employ of Appellant Within the Meaning of the Selective Training and Service Act and That His Claims Are Not Wholly Barred by Limitations or Laches.

The Selective Training and Service Act provides two complete defenses to a veteran's claims for reinstatement and damages, even though the veteran is within the general protection of the Act and has acted in a timely fashion.

Section 308(b), Subsection (B) provides:

“If such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;”

Thus there are two alternative and complete defenses to a veteran's action for reinstatement and/or damages, as follows:

(a) Where the employer's circumstances have so changed as to make reinstatement impossible or unreasonable; and

(b) Where a veteran refuses to accept an employer's offer of a position of like seniority, status and pay.

Where the position held by the veteran is no longer in existence when he applies for reinstatement, such change in circumstances is sufficient to make reinstatement unreasonable. *Featherston v. Jersey Central Power & Light Co.* (3 Cir.), 161 F. 2d 1000; *Meyers v. Barenburg*

(4 Cir.), 161 F. 2d 850; *Frank v. Tru-Vue, Inc.*, 65 Fed. Supp. 220, *supra*; *Rosenbaum v. Ceco Steel Products Co.*, 84 Fed. Supp. 954, *supra*.

Furthermore, where there is a substantially comparable position in the employer's organization, the veteran has no right to insist on more than an offer of such comparable existent position, and a rejection of such an offer bars relief under the Act. In *Bowen v. Home Beneficial Life Insurance Company* (E. D. Va.), 18 C. C. H. Labor cases, Par. 65,720, affirmed (4 Cir.), 183 F. 2d 376, the District Court said at page 77,389:

"The offer of restoration made by the defendant to the plaintiff upon his application for reemployment constituted an offer by the defendant of a position of like seniority, status and pay equivalent to that of the position which the plaintiff left upon his induction into the Armed Service and the employer's circumstances had so changed during the period of the plaintiff's absence as to make it impossible and unreasonable for defendant to restore the plaintiff to a position identical in every respect to the position formerly held by him. Therefore, the offer made by the defendant constituted full compliance with the requirements of Section 8 of the Act and the plaintiff's refusal to accept such offer constituted a waiver by him of the rights to reemployment otherwise conferred upon him by said Act. The damages sought by the plaintiff against the defendant are, therefore, barred by his refusal to accept the offer of reemployment made by the defendant."

To the same effect are: *Corsi v. Foote Pierson & Co.* (D. N. J.), 12 C. C. H. Labor Cases, Par. 63,543; *Inglot v. Columbia Aircraft Products, Inc.* (3 Cir.), 166

F. 2d 433; *Cohen v. Schaulsky* (D. N. J.), 13 C. C. H. Labor Cases, Par. 64,026; *Bozar v. Central Pennsylvania Quarry etc. Co.* (M. D. Pa.), 73 Fed. Supp. 803; *Trusteed Funds, Inc. v. Dacey* (1 Cir.), 160 F. 2d 413.

1. Appellant's Circumstances Had so Changed as to Make It Impossible or Unreasonable to Require It to Reinstate Appellee in His Exact Pre-war Position.

Appellant's circumstances, as bearing upon appellee's exact pre-war position, had changed in the following respects when he applied for reinstatement in January 1946:

(a) Appellant's sales effort was conducted through full time employee-salesmen rather than through manufacturer's representatives, the method used prior to 1942;

(b) Appellant hired directly all the employee-salesmen in a particular territory and such employee-salesmen were compensated by a percentage of all sales in such territory, whereas there had previously been only one manufacturer's representative in a territory, who had employed his own assistants;

(c) Appellee's pre-war Kansas City territory had been somewhat reduced in geographical area; and

(d) The commission rate had been uniformly reduced from 12½% to 7½% for all the sales force.

In order completely to appreciate the significance of the conversion from manufacturer's representatives to full time employee-salesmen, it is necessary to review both appellant's history and the history of the tool industry generally. Prior to 1942 when the change-over was primarily effectuated, appellant was going through the

period of its early growth. In these circumstances it was appellant's practice to allow, and even to encourage, its manufacturer's representatives to handle the products of other manufacturers, for the reason that appellant's product was not sufficiently established to provide representatives with adequate compensation for their full time and service [R. 30-31, 161-162]. Such a temporary expedient was a customary practice in harmony with the general practice of manufacturers breaking into the tool industry [R. 164].

The general trend of the tool industry, however, was toward conversion to full time employees when the particular manufacturer achieved sufficient volume and good will to warrant requiring and paying for full time services.

A tool line, being highly competitive and detailed, requires concentrated selling for maximum results. Effective marketing is not achieved by merely calling upon customers to replace stock. The company found that customers were resistant to tool sales by multiple line manufacturers' representatives and desired full time employee representation of the manufacturer. Good will and sales volume could be built up only by meeting customer desires and by obtaining full time employees under the company's direct control and supervision as to the manner and method of the sales technique utilized [R. 119-120, 144-145, 166, 168-169].

In 1941, appellant realized that it was coming of age—volume and good will were rapidly expanding [Ex. S]—and began consideration of the feasibility of converting its

sales force to full time employees in order to exploit the full potential of its product. This program was studied by appellant's executives with the assistance of an expert research organization [R. 130, 168-169].

Early in 1942 appellant determined upon the course of converting its sales force to full time employees, and at that time put such policy into effect as to all but three of its salesmen [R. 170-171]. In the case of one exception, Mr. Jones, the policy was not put into effect in 1942 because of difficulties of a geographical and sales volume nature encountered in his particular territory; this exception had been eliminated when appellee sought reinstatement in 1946 [R. 171]. In the case of the second exception, Mr. Schrenker, appellant did not put the policy into effect in 1942 because Schrenker, who represented only two other small tool lines and who employed two other men to handle them, agreed to spend his own full time in the sale of appellant's products, leaving the other lines to his assistants, and thus meeting appellant's primary objection to manufacturer's representatives [R. 136, 171]. In 1946 when appellee requested reinstatement, Schrenker was still spending his full time on appellant's line, but had been informed that it would be essential for him to convert to employee status at the end of the year [R. 136, 140]. Appellee was the third exception, and appellant did not put the new policy into effect in 1942 in his case because it knew that he would shortly leave for service in the armed forces and did not wish to impose upon him the inconvenience entailed in such a change-over [R. 146].

Appellant's policy, thus determined and put into effect, had proven its effectiveness by the results achieved up to the time of appellee's application for reinstatement in 1946. The company's total sales had increased from \$2,414,000 in 1941 to \$6,852,000 in 1945, and further to \$10,600,000 in 1946 [Ex. S]. Concurrently, appellant's percentage of the total tool industry sales rose from 5.4% in 1941 to 9.0% in 1945 and 11.7% in 1946. And while the increase in volume may have been due in part to activity occasioned by the war, appellant's capture of a progressively greater percentage of the total industry sales shows the results of its revised sales policy with its broader and more concentrated coverage of customers.

In view of the change of appellant's circumstances outlined above, and the proven success of its altered sales policies, it would have been unreasonable indeed to require appellant to reinstate appellee in his exact pre-war status as a manufacturers' representative, free to handle other lines, and thus to require the company to retrogress to a policy proven far less effective. Even the District Court recognized this in part by ordering appellee reinstated only as a full-time employee in the Kansas City territory *as constituted in January, 1951* and under the same arrangements as *then* existed for the then acting sales manager of that territory [Concl. VI, R. 18; Judg., R. 20-21].

We submit that reinstatement on the pre-war basis would have been just as unreasonable in 1946 as in 1951, and that the District Court erred in concluding to the contrary.

2. Appellant Fully Satisfied Any Obligation It May Have Had to Appellee by Offering Him "a Position of Like Seniority, Status and Pay," and Appellee's Rejection of Such Offer Bars His Rights Under the Selective Training and Service Act.

Wholly aside from changed circumstances making reinstatement unreasonable, the Act imposes on the employer only an alternative obligation, *i. e.*, to restore the veteran *either* to his pre-war position *or* to "a position of like seniority, status and pay." Even if the exact pre-war position is still available, the employer can satisfy any obligation he has by offering a position of the latter type.

In *Schwetzler v. Midwest Dairy Products Corporation* (7 Cir.), 174 F. 2d 612, the plaintiff had been employed to sell soft drinks on one of seven routes operated by defendant. Upon plaintiff's discharge from the armed services, defendant declined to give him his pre-war route, but offered him another route which carried with it the opportunity for earnings at least as great. The plaintiff refused because the new route involved more mileage and longer hours. The Court of Appeals for the Seventh Circuit held that the offer discharged the employer's obligation, saying at pages 613-614:

" . . . the Act does not require that the returning veteran be given the same position, but only that he be given that position or a comparable one, and the cases upon which appellant relies do not support a contrary contention.

.
"We conclude that since (1) appellant admits that he was offered a sales route, (2) there is substantial evidence that the route offered did afford comparable opportunities as to seniority, status and pay, and (3)

the Act does not require restoration of the same position, provided a position of like seniority, status and pay is proffered, there was no error in the conclusion of the court that appellant was not entitled to the relief sought, namely, restoration to his 'former employment as route salesman with the same route which he was working immediately prior to his induction'."

In this case appellant, despite its belief that appellee had no rights under the Selective Training and Service Act, considered him to be a good salesman [R. 142, 143, 151-152, 217] and offered him a position which was fully the equivalent of his pre-war "position" in seniority, status and pay. In January, 1946, Mr. Kerr, vice-president of appellant, offered him a position as a full-time employee in charge of the Kansas City territory as then constituted, selling not only appellant's products but also those of its subsidiaries, P. & C. Hand Forged Tool Co. and Peneus Corporation [Stip. Ex. 50, App. A, par. 10], and replacing Mr. Freund who had succeeded to that position upon appellee's entry into the navy, upon the identical terms then applicable to Mr. Freund [R. 122-124, 186-187]. Under those terms, the company would employ two other men to assist him in covering the territory and the commissions of $7\frac{1}{2}\%$ on all sales in the territory would be divided between appellee and these other salesmen in a mutually agreeable manner, which in Freund's case was 40% to Freund and 30% to each of the others [R. 127-129, 156, 187, 216-217]. It was a condition of the Kansas City offer that appellee would have to give his full time to the company and give up his other lines within a period of approximately thirty days [R. 123, 124, 126].

This requirement was the stumbling block [R. 123] and was the only part of the offer to which appellee made any

objection. He refused the offer because he was unwilling to give up his other lines [R. 123], saying that he would have to have at least a year before he could do so [R. 125] and reiterating in a letter dated February 10, 1946 [Ex. 31; R. 131-132], that he was going to continue with the others "at least until the first of the year."

Likewise in January, 1946, appellant, through Mr. Kerr, offered appellee an alternative position as manager of the Chicago territory selling the products of appellant and its subsidiaries [Stip. Ex. 50, App. A, par. 10], upon the same terms as to commissions as then enjoyed by the company's other salesmen [R. 124]. The Chicago territory was not then as productive as the Kansas City territory, although it was considered to be potentially even better [R. 193], and for this reason appellant offered, in connection with the Chicago territory, to let appellee continue his handling of other lines for the period of one year in order to supplement his earnings [R. 124-125, 186, 192-193]. Appellee also rejected this alternative offer [R. 130-131].

The good faith of appellee in stating that he wanted at least a year in which to give up his other lines is open to some question in view of events subsequent to January, 1946. In March of that year, appellee met Mr. Kerr in Kansas City; the offers were repeated and appellee was still unwilling to give up his other lines [R. 132-133]. Again in December, 1946, when the year originally mentioned by appellee had almost passed, he saw Messrs. Pendleton and Kerr in Atlantic City. They renewed the offer to take him back on a full-time basis in either the Kansas City or the Chicago territory; but again he declined to relinquish his other lines [R. 134-135, 179-180]. The fact that he was then receiving more commissions than he had received from all sources, including appellant, in

1941 and 1942 [Ex. Q] undoubtedly increased his reluctance to give up the others and to work exclusively for appellant.

It is clear that the offer of the Kansas City territory on a full-time basis was fully the equivalent of appellee's pre-war "position" in seniority, status and pay.

As for seniority, if appellee had accepted the offer, he would have displaced Freund [R. 129, 148], who had taken charge of the territory upon appellee's entry into military service, on exactly the same basis as that enjoyed by Freund. Appellee would have regained the exact position which he would have had in 1946 if he had never left in 1942, and thus would have "stepped back on the escalator" at the same relative point where he left it. See: *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U. S. 275, 284-285.

With respect to pay, appellee cannot complain of the decreased area of the territory or of the reduction in the commission rate to 7½%, which was in effect in 1946 for all salesmen [R. 135-136, 201]. As the Court of Appeals for the Third Circuit so aptly said in *Schreier v. M. H. Fishman Co., Inc.* (3 Cir.), 176 F. 2d 722, at 726:

"Under the principle of the Fishgold case if the escalator moves down instead of up we think the veteran must accept that detriment precisely as the employer must carry the burden of increased salary if the escalator turns upward."

Nor can appellee complain of the requirement that two other salesmen be employed by the company to assist him in covering the territory and be compensated out of the

commissions earned on sales in the territory, for more adequate coverage could thus be attained and the total territorial commissions correspondingly increased.

The decrease in the area of the territory is rendered completely insignificant by the fact that the total sales in appellee's pre-war territory were only \$110,000 in 1941 and \$136,000 in 1942, whereas sales in the reduced territory amounted to \$404,000 in 1945 and \$737,000 in 1946 [Ex. S]. More importantly, the somewhat smaller Kansas City territory accounted for 7.65% of appellant's total commission sales in 1945 and for 7.38% in 1946, whereas the larger territory handled by appellee produced in 1941 only 6.9% and in 1942 only 5.2% of the total [Ex. S].

Even with the lower commission rate, the decreased area and the two assistant salesmen, the position offered appellee as manager of the Kansas City territory afforded an opportunity for earnings greatly in excess of his pre-war earnings derived from appellant, and even in excess of his pre-war earnings from all sources.

During 1946, Mr. Freund, whom appellee would have replaced if he had accepted the offer, received \$34,877.21 from appellant Plomb Tool Company (net of amounts paid the other salesmen in the territory) and an additional amount of \$4,633.66 from appellant's subsidiary, P & C Hand Forged Tool Co., whose products appellee would likewise have been authorized to sell under the offer [Exs. 48, 49]. This total of \$39,510.87 is to be compared with \$12,576.20 which was the average annual amount of appellee's earnings from Plomb in 1941 and 1942 and with \$22,197.79 which represents his average annual earnings from *all sources* in those years [Ex. Q]. In fact, Freund's earnings from Plomb and its subsidiaries

for the four years 1946 through 1949 averaged \$23,566.01 per year [Ex. 48], thus exceeding appellee's average earnings from all sources during 1941 and 1942. In the light of these facts, there can be no question but that the offer of the Kansas City territory was more than equivalent in opportunity for earnings.

Appellee's only reason for refusing the offer was that he would have been required to relinquish his other lines. But that condition in no way destroyed the equivalence of the offer, for the privilege of representing other lines was in essence merely a matter of compensation or pay. That privilege had been extended in the early days of the company by reason of its inability to pay adequately for the full time of its sales representatives [R. 30-31], and the comparative earnings set forth above demonstrate beyond question that the compensation for the position offered appellee was more than adequate to make up for dropping his other lines.

The District Court in its oral opinion concluded that the offer of the Kansas City territory fell short of being an offer of a position of like seniority, status and pay "(1) by reason of the indefiniteness of the commission rate, and (2) by reason of the fact that although one other salesman [Schrenker] who had not entered the service was being permitted to handle other lines in another territory, that privilege which this plaintiff had enjoyed prior to the time he entered the service was to be denied him in the offer made." [R. 221.]

As to the commission rate, the evidence shows without conflict that appellee was told by Mr. Kerr that the commission rate for all salesmen had been reduced to $7\frac{1}{2}\%$

[R. 126-127]. The evidence further shows [R. 128-129, 156], and appellee admitted [R. 216-217], that as part of the offer, appellee and Mr. Kerr definitely discussed the percentage of total Kansas City territory commissions which appellee would have been entitled to receive as head of the territory and the smaller percentage which the two assistants would have received had the offer been accepted.

Further, appellee's steadfast refusal to accept any position which required that he forego representation of other lines made it unnecessary for appellant to delineate any more specifically the details of its offer [R. 188], for those details were unimportant so long as the major difference between the parties remained. In *Major v. Phillips-Jones Corp.* (S. D. N. Y.), 18 C. C. H. Labor Cases, Par. 65,853, it was held that the defendant had made an offer of a position of like seniority, status and pay and that plaintiff's rejection of such offer barred his rights under the Act even though the defendant in making the offer had never designated the territory in which it would be willing to reinstate the plaintiff. The Court said at page 77,848:

“ . . . The plaintiff refused the aforesaid offer of reemployment and made it clear that he would not accept any territory except the one which he had at the time he entered the service and that he would travel to Chicago or New York only with the understanding that he would receive his old territory immediately. At no time did plaintiff request defen-

dant to inform him the territory it would be willing to grant him, nor did he ever give the defendant an opportunity to so inform him.”

Similarly in this case, appellee raised no question concerning the division of commissions between the manager and other salesmen in the territories offered him [R.197].

As already noted, Schrenker had not been required to drop his two other small tool lines by January, 1946, because he had agreed to devote, and was devoting, his own full time efforts to appellant's business, leaving his other lines to his assistants [R. 136, 171], with the result that appellant was obtaining the same benefit from his services as from an employee salesman. This was clearly an arrangement far different from that which appellee contemplated when he refused to relinquish his other lines. Further, Mr. Schrenker had been advised that he would have to change over at the end of the year [R. 136, 140].

We submit that appellant did offer appellee “a position of like seniority, status and pay” equivalent to that left by him, and that the District Court's conclusion to the contrary [Concl. III, R. 18] is erroneous as a matter of law. Appellee's unequivocal rejection of this offer because it required full time employment, constituted a waiver of any rights to reinstatement or damages otherwise conferred on him by the Act. In short, he refused to become an employee and insisted upon renewal of his status as an independent contractor, a matter beyond the scope of the Selective Service Act.

E. Assuming, Without Conceding, That Appellee Is Entitled to Any Relief, the Relief Awarded Appellee Is Excessive as Matter of Law on Five Counts.

If any relief was justified (which we deny on the grounds already stated), it was erroneous to order appellee reinstated for one year after judgment and to award him damages in the amount of \$79,475.05, together with interest at 7% from January 1, 1947, an aggregate sum of \$102,185.25.

- 1. By Reason of His Delay in Filing Suit, Appellee Is Not Entitled to Recover Any Damages for Loss of Earnings for Any Period Prior to the Commencement of This Action on September 22, 1949.**

The District Court awarded damages for loss of earnings for the calendar year 1946 [Find. XV, R. 15-16] plus 7% interest from January 1, 1947 [Concl. V, R. 18], on the theory that appellee was entitled to reinstatement for one year after his application in January, 1946 [R. 221-222]. In view of the fact that this suit was not filed until September 22, 1949, this award is contrary to the established rule, consistently adhered to by the courts, that a delay of only a few months in filing suit precludes the award of damages for any period prior to the commencement of the action,—and this although the veteran has not been guilty of such laches as will bar his entire rights under the Act (see Point B, *supra*). In fact, no case has been found in which any court has awarded damages for a period prior to the commencement of an action where the delay extended over a period even approaching the three years and seven months involved in this case.

In *Kay v. General Cable Corporation*, 59 Fed. Supp. 358, affirmed on rehearing 63 Fed. Supp. 791, the court held that a veteran's delay of six months in instituting suit precluded the award of any damages for the period prior to the filing of the action, saying (59 Fed. Supp. at 360):

“ . . . The Act contemplates that such action shall be taken immediately upon an employer's refusal to restore and specifically instructs that ‘The court shall order a speedy hearing in any such case and shall advance it on the calendar.’ It follows that if proceedings are not instituted in the District Court until some six months following the veteran's discharge from service and the employer's refusal to restore him to his former position, notwithstanding that negotiations between the employer and the veteran have been held in the interim, it would be beyond the scope of the Act to compel the employer to compensate for such extended period.”

On rehearing the court said further regarding negotiations (63 Fed. Supp. at 794):

“Where the refusal by the employer is final, the Act does not contemplate that a veteran shall conduct fruitless, long continued efforts at reinstatement and on a failure thereof, compel such employer to compensate him for this extended period of negotiation, in addition to such reasonable time as may be allowed for appropriate consultation.”

Appellee's fruitless and spasmodic negotiations with appellant fall directly within the meaning of the above quotation from the *Kay* case and therefore cannot excuse his delay. Further, it will be recalled that appellee waited more than ten months after the last of appellant's frequently reiterated refusals to reinstate, in November 1948, before commencing this action.

Further illustrative of the rule are *Dacey v. Bethlehem Steel Co.* (D. Mass.), 66 Fed. Supp. 161, involving a delay of nine and one-half months; *Azzerone v. W. B. Coon Co.* (W. D. N. Y.), 73 Fed. Supp. 869, involving a delay of eight months; *Polansky v. Elastic Stop Nut Corp.*, 78 Fed. Supp. 74, where the delay was thirteen months; *Anglin v. Chesapeake & Ohio Railway Co.* (S. D. W. Va.), 77 Fed. Supp. 359, involving eighteen months' delay; and *Patrick v. Norfolk & Western Ry. Co.* (S. D. W. Va.), 18 C. C. H. Labor Cases, Par. 65,723, where a delay of twenty-three months was held not only to preclude recovery of damages for the period prior to filing suit, but also to bar the entire action on the ground of laches.

The award of damages for the interim period between the employer's refusal to reinstate and the commencement of an action is barred by the veteran's delay in filing suit even though the delay is occasioned by his seeking the assistance of the appropriate authorities such as the United States attorney and the veteran's agencies. *Thompson v. Chesapeake & O. Ry. Co.* (S. D. W. Va.), 76 Fed. Supp. 304; *Noble v. International Nickel Co., Inc.* (S. D. W. Va.), 77 Fed. Supp. 352, 354-5.

As already noted, appellant was in no way responsible for the three years and seven months of delay in this case, and certainly not for the ten months of delay after negotiations broke down. As in the cases cited above, it would be unfair to uphold an award of damages for any period prior to the filing of the action on September 22, 1949, for otherwise, the veteran is permitted to wait through the year in which he claims the right to reemployment in order to see how his earnings from other sources compare with those of the position he claims and then, if the balance becomes

favorable, to collect from the employer. (The injustice to the appellant in this case is aggravated by the District Court's failure to allow an offset for appellee's other earnings, to be discussed below under Point E, 5.)

2. **The Selective Training and Service Act Guarantees a Veteran Only One Year's Reemployment and Appellee Is Not Entitled to Damages Measured by His Loss of Earnings During the Entire Calendar Year 1946 in Addition to Reinstatement for the Period of One Year Sometime Subsequent to the Beginning of the Year 1951.**

The Selective Training and Service Act guarantees a veteran reemployment for one year by prohibiting discharge of a reinstated veteran without cause during that period. The judgment of the District Court gave damages for loss of earnings for the entire year 1946 and also ordered appellee reinstated for one year after judgment [R. 20-21], thus giving appellee the benefit of two years of reemployment. The damage award gave him the benefit of the earnings from the "position" he claimed, *i. e.*, his exact pre-war territory at his pre-war commission rates, with the continued right to handle other lines and without offset for earnings derived therefrom. The order for reinstatement, however, provides that appellee shall be reinstated in the Kansas City territory as it presently exists, at present compensation rates, and as a full-time employee. In essence, the judgment orders appellee reinstated in the very position which appellant offered, and which appellee rejected when he originally sought reinstatement in 1946 (thus recognizing, in effect, the equivalence of the offer held not to be equivalent).

Could there be a more onerous judgment than one which allows a litigant to accept five years later the benefits of a

proposition which he rejected, merely because history has demonstrated that his original rejection was not well conceived, and at the same time awards damages in the amount of \$102,185.25 on the theory that his rejection was justified? We think not!

The award of damages for the year 1946 is not only inconsistent with the authorities cited above which limit damages to the period following commencement of the action, but also is in error in awarding damages for a period so chronologically separated from the time of reinstatement. Courts have awarded damages in addition to reinstatement for the period of one year on the theory that such damages are incidental. If damages in an amount of \$102,185.25 could ever be termed incidental, they quickly lose such character when thus separated from the time of reinstatement.

3. Damages Measured by Loss of Earnings for 1946 Should Have Been Computed on the Basis of the Commission Rate of $7\frac{1}{2}\%$ Actually in Effect for All Appellant's Sales Representatives During That Year.

The District Court awarded damages for loss of earnings in 1946 on the basis of appellee's pre-war commission rates of $12\frac{1}{2}\%$ and 8% , an average rate of 12.11% [Find. XV, R. 15-16], despite the fact that appellant in 1944 uniformly reduced the commission rate to $7\frac{1}{2}\%$ for all sales representatives [R. 201]. This reduction was made for well-considered business purposes and, as events subsequently proved, resulted in an increase in total commissions to the salesmen by virtue of the increase in sales volume.

In these circumstances, awarding appellee damages based upon a 12.11% commission rate resulted in preserving for the veteran a super-seniority which is not within the scope of the Act.

In *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U. S. 275, the United States Supreme Court said at page 284:

“ . . . He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job”

And further at pages 285-6:

“ . . . But we would distort the language of these provisions if we read it as granting the veteran an increase in seniority over what he would have had if he had never entered the armed services. We agree with the Circuit Court of Appeals that by these provisions Congress made the restoration as nearly a complete substitute for the original job as was possible. No step-up or gain in priority can be fairly implied. Congress protected the veteran against loss of ground or demotion on his return. The provisions for restoration without loss of seniority to his old position or to a position of like seniority mean no more.”

As previously quoted from *Schreier v. M. H. Fishman Co., Inc.* (3rd Cir.), 176 F. 2d 722, at 726, *supra*:

“Under the principle of the Fishgold case if the escalator moves down instead of up we think the veteran must accept that detriment precisely as the employer must carry the burden of increased salary if the escalator turns upward.”

In other words, it is the intent of the Act to prevent discrimination by preserving to the veteran a status comparable to that which he held at the time he entered the service in relation to the other employees. It is not the intent of the Act to grant a "super-seniority." Where the commission rates have been uniformly reduced for all sales representatives, an award of damages at a higher commission rate results in granting the prohibited super-seniority and discriminates against non-veterans.

4. Loss of Earnings Should Have Been Computed on the Basis of the Kansas City Territory as It Existed in 1946.

As in the case of the commission rate, the award of damages for loss of earnings in 1946 was based upon sales in the Kansas City territory as it then existed, as well as in the State of Minnesota and the four South Dakota counties which were included in that territory when appellee had it in 1942, but which had subsequently been eliminated from it. This portion whittled off from appellee's pre-war territory, prior to his request for reinstatement, had accounted for only a small amount of appellee's sales [R. 147]. And, as already pointed out, the smaller Kansas City territory in 1946 produced far greater sales volume and, more importantly, accounted for a greater percentage of the company's total commission sales, than did the somewhat larger territory handled by appellee in 1942.

The authorities cited in the next preceding section of this brief with reference to the reduced commission rate are equally applicable here. To have awarded appellee damages based on sales in the Kansas City territory, as geographically constituted in 1946, would not have discriminated against him. On the contrary, it would have given him commissions on a higher percentage of the

company's total sales than he had theretofore enjoyed. That higher percentage was the result of a more concentrated sales effort on the part of the company and the men who covered the territory during appellee's absence, and would have more than compensated him for the loss of Minnesota and the four South Dakota counties. The damage award as computed by the District Court gave appellee the benefit of both, and in fact rewarded him with the same "super-seniority" that was not intended by the Act. In line with the principle that the veteran is entitled to "step back on the escalator" whether it has travelled up or down, the damages should have been computed on the basis of the area of the territory as it had been changed in the normal course of business during his absence.

5. Any Damages Awarded Appellee for Loss of Earnings Should Have Been Subject to Offset for Amounts Earned by Appellee in Other Employment During the Same Period.

The veterans' reemployment cases clearly establish the principle that an employer is entitled to an offset, in determining the amount of damages awarded a veteran, for the veteran's earnings from other employment during the same period. *Bentubo v. Boston & Maine R. R.* (1 Cir.), 160 F. 2d 326; *Hayes v. Boston & Maine R. R.*, 66 Fed. Supp. 371, 374, aff'd (1 Cir.) 160 F. 2d 325; *Thompson v. Chesapeake & O. Ry. Co.* (S. D. W. Va.), 76 Fed. Supp. 304, 308, *supra*. These cases are in line with the general principle which requires that damages be mitigated.

But the District Court refused to allow an offset for appellee's other earnings, and in effect gave appellee the benefit of almost the full-time efforts of another man (Freund) for 1946, in addition to the fruits of appellee's

own full-time efforts in selling the five other lines handled by him in 1946.

The District Court's damage computation [Find. XV, R. 15-16] takes into account the total gross sales of Plomb tools in the Kansas City territory, as constituted in 1946, and the total gross sales in Minnesota and four South Dakota counties which were included in the pre-war Kansas City territory. Such sales were the sales achieved by five full-time employee salesmen; three (including Freund) in the post-war Kansas City territory, and two in Minnesota and South Dakota, who sold only the products of appellant and its subsidiaries. The computation gives appellee credit for commissions on these total sales at his pre-war average rate of 12.11%, and then deducts the amounts actually paid as commissions, at the 1946 rate of $7\frac{1}{2}\%$, to the four men other than Freund (whom appellee was held entitled to replace). In effect the District Court held (and said in its oral opinion [R. 222]) that appellee would have been able to earn (at 12.11%) all the commissions from appellant that Freund did (at $7\frac{1}{2}\%$) as a result of substantially his full time efforts, in addition to what appellee actually earned during 1946 by the handling of five other lines. That Freund spent substantially his full time on sales of Plomb products is demonstrated by the fact that his compensation from the sale of Plomb tools in 1946 was more than 88% of the total compensation he received that year from the sale of products of appellant and its subsidiaries [Ex. 48].

Appellee presumably spent his full time in earning the \$24,141.56 which was paid to him in 1946 in the form of commissions by the five firms then represented by him [Ex. Q]. This is shown by the fact that his 1946 earn-

ings from those five firms were larger than his earnings in either 1941 or 1942 from those firms and from appellant [Ex. Q]. Obviously appellee, by devoting to the sale of the other lines in 1946 the additional time and effort which he had formerly spent in the sale of appellant's products, was able to increase his gross sales of the other lines to about 260% of their 1942 volume.

While there is a suggestion in appellee's testimony that he could have sold the appellant's tool line along with his other five lines by utilizing time that was available in any event [R. 218], the accuracy of such an assertion is belied not only by common sense and logic, but also by the increase mentioned above in the sales of appellee's other lines after he had ceased to represent Plomb. It simply doesn't make sense that a salesman with five lines of products can take on a separate and substantially unrelated tool line, continue to sell the same volume of the other five lines, and in addition sell the same volume of the tool line as another man had been able to sell spending approximately his full time on that line. A salesman cannot call upon a customer and discuss six or more lines of products as effectively as a single tool line. As previously pointed out, Mr. Kerr and Mr. Pendleton testified that customers resisted sales by manufacturer's representatives with numerous lines of products and preferred a full-time employee salesman representing one line. And Mr. Kerr, who has had long experience in the tool business and who is now serving as vice-president of one of appellant's competitors [R. 118], testified that his experience showed

that it is *not* just as easy for a man handling several automotive parts lines to sell a tool line in conjunction therewith, and that such a combination does not work out satisfactorily. A tool line, being more detailed and having many items, requires more merchandising activity on the part of a salesman in talking to the prospective customer, checking stock, etc., and does not work out efficiently in conjunction with other automotive lines [R. 144-145].

Since Mr. Freund derived 88% of his income in 1946 from the sale of Plomb products and presumably spent at least that proportion of his time on such sales, it would be only just and reasonable to permit an offset for 88% of appellee's earnings from other sources in 1946, for he would have had to spend approximately that portion of his time on Plomb sales in order to achieve the results obtained by Freund. The same principle should be applied to the period after the filing of the action on September 22, 1949 (which we contend is the only period for which damages could properly have been allowed, if any at all were justified), during which approximately 95% of Freund's earnings were derived from Plomb sales, as distinguished from those of its subsidiaries [Ex. 48], and in connection with which there should be an offset for 95% of appellee's earnings from other sources during the same period.

The District Court's denial of any offset gave appellee the benefit of practically the full-time efforts of Freund while permitting him to keep as well the fruits of his own full-time efforts.

Conclusion.

For the reasons set forth above, appellant respectfully submits that the judgment of the District Court should be reversed and the cause remanded with instructions that judgment be entered in favor of appellant.

Respectfully submitted,

O'MELVENY & MYERS,

SIDNEY H. WALL,

CLYDE E. TRITT,

Attorneys for Appellant.



APPENDIX A.

[Title of District Court and Cause.]

Pre-Trial Stipulation. (Plaintiff's Exhibit 50.)

STIPULATION OF FACTS.

IT IS HEREBY STIPULATED by and between the parties hereto, through their respective counsel of record, that the following facts are true and may be taken by the Court as true for the purposes of this action, subject, however, to such objections, reservations or limitations as are hereinafter specified by the respective parties hereto in Section III of this Pre-Trial Stipulation, and subject further to the right of either party hereto to introduce at the trial of this action other evidence not inconsistent with the facts herein stipulated:

1. In this action plaintiff claims that defendant wrongfully failed to reemploy him after his discharge from the armed forces of the United States, in asserted violation of his rights under the Selective Service Act of 1940 (50 U. S. C. App. Sec. 308) and the Service Extension Act of 1941 (50 U. S. C. App. Sec. 357). He seeks, (a) an order that he be reinstated in the employ of the defendant and, (b) a judgment for damages in the amount of \$200,000.

2. Defendant is a corporation duly organized and existing under the laws of the State of California and defendant maintains a place of business at 2209 Santa Fe Avenue, City of Los Angeles, State of California. Defendant is engaged in the business of manufacturing and selling hand tools and related items.

3. In November 1942, and for approximately nine years prior thereto, plaintiff was authorized as a manufacturer's representative to sell merchandise of defendant on a commission basis in the following territory: the states of Kansas, Iowa, Minnesota and Missouri; Nebraska (east of the extension of the Colorado eastern boundary); the following counties in the State of South Dakota: Brown, Beadle, Sanborn and Bonhemme; and the City of Rock Island, Illinois.

4. In November 1942 plaintiff terminated his said relationship with defendant in order to perform military training and service in the armed forces of the United States, and plaintiff thereupon entered upon active naval service in the naval forces of the United States and served continuously thereafter in such naval service on active duty until November 15, 1945, at which time plaintiff was relieved from such training and service and was ordered released from active duty.

5. Immediately prior to plaintiff's entry upon active naval service as aforesaid, plaintiff was engaged in the sale of defendant's products on a commission basis as stated in paragraph 3 above under and pursuant to a certain agreement in writing between plaintiff and defendant executed by plaintiff on January 18, 1941, as amended by a supplemental territorial agreement dated February 1, 1941, and executed by plaintiff on March 19, 1941, by an extension agreement dated December 8, 1941, and executed by plaintiff on December 16, 1941, and by supplemental agreements dated respectively April 22, 1942, and September 23, 1942.

6. During the entire period from January 1, 1941, to November 1942 covered by the aforesaid written agreement, as amended and extended;

(a) Defendant did not furnish plaintiff with an office and did not pay or reimburse plaintiff for any office expenses.

(b) Plaintiff as a manufacturer's representative represented other manufacturers in addition to defendant and was authorized to and did sell on a commission basis the products and merchandise of other manufacturers in addition to those of defendant. During the period from January 1, 1941, to November 1942, plaintiff so represented the following other manufacturers:

Wohlert Corporation, Lansing, Michigan;

Powell Muffler Company, Utica, New York;

Eis Automotive Corp., Middletown, Connecticut;

Pep Manufacturing Co., New York, New York;

National Motor Bearings, Oakland, California; and

Precision Parts Manufacturing Co., Chicago, Illinois.

(c) During said period from January 1, 1941, to November 1942, plaintiff received \$26,072.16 from defendant as compensation for his sales of defendant's products, and during the same period plaintiff received from other manufacturers \$20,244.49 as compensation for the sale of the products and merchandise of such other manufacturers.

(d) With the exceptions noted below, plaintiff paid his own expenses in connection with his activities as such manufacturer's representative in selling defendant's products and those of other manufacturers represented by him, and in connection therewith plaintiff hired and paid with his own funds one assistant who was chosen by plaintiff and who acted pursuant to plaintiff's directions. Defendant, in January 1941, paid plaintiff \$30 in partial reimbursement of his expenses in attending an Automotive Service

Industry Convention. Defendant made available to plaintiff a display truck owned by defendant, and in December 1941, defendant paid plaintiff \$200 for repairs and tires for said truck.

(e) In the conduct of his business as such manufacturer's representative, plaintiff chose his own customers to whom he sold or attempted to sell products of defendant and determined his own itineraries in calling upon customers and prospective customers. Plaintiff was requested by defendant to make reports to defendant concerning such itineraries and calls, but plaintiff did not follow any regular reporting plan as requested. Defendant from time to time furnished to plaintiff names of prospective customers in plaintiff's territory from whom defendant received inquiries, and plaintiff reported to defendant regarding the same.

(f) Defendant made no deductions from commissions paid or payable to plaintiff by it for or on account of Social Security taxes, old age benefits or unemployment insurance.

(g) Plaintiff made no investment in a stock of defendant's merchandise. In addition to its stock in Los Angeles, defendant maintained and paid the storage charges on a stock of merchandise in Kansas City from which customers in plaintiff's territory were supplied insofar as possible.

(h) Defendant had the final authority on extension of credit to customers, and in specific instances from time to time defendant requested plaintiff to report to it upon his activities in collecting past due accounts.

7. On November 15, 1945, plaintiff was placed on inactive duty by the United States Navy with a certificate of

satisfactory service, and his terminal leave expired December 29, 1945.

8. During the month of January 1946 and within ninety days after plaintiff was released from training and service in the naval forces of the United States, plaintiff made application to defendant for renewal of his prewar status as a manufacturer's representative selling defendant's products as hereinabove described in Paragraphs 3 and 5 hereof, but upon such application defendant refused to renew plaintiff's said prewar status.

9. In January 1946 when plaintiff requested renewal of his prewar status with defendant, defendant had revised the geographical limits of its sales territories, and the State of Minnesota and all counties in the State of South Dakota had been eliminated from the territory in which plaintiff formerly had been authorized to sell defendant's products. At that time, the sales of defendant's products in such reduced territory were being handled by two full-time salesmen employed by defendant, which salesmen handled the sale of no products other than those of the defendant and its subsidiary corporations, P & C Hand Forged Tool Co. and Penens Corporation. Defendant had theretofore determined that the employment of full-time salesmen in said territory as aforesaid was necessary by reason of the increase in the volume of defendant's business and in the number of its customers.

10. In January 1946 when plaintiff applied for renewal of his prewar status, defendant offered plaintiff a position as an employee of defendant, selling exclusively the products of the defendant and its subsidiary corporations, P & C Hand Forged Tool Co. and Penens Corporation, either

(a) in the territory in which plaintiff had been previously authorized to sell defendant's products on a commission basis, as such territory had been revised as aforesaid, or (b) in the "Chicago territory" which then consisted of the State of Illinois and portions of the States of Indiana, Michigan and Wisconsin. Plaintiff had, prior to his military service, handled and sold products of said subsidiary corporations only in cases where such subsidiaries had made tools for defendant on special orders, and only as a manufacturer's representative for defendant. Plaintiff was informed that if he accepted either of the foregoing proposals it would be necessary for plaintiff to work for defendant exclusively as set forth above and to cease to represent other manufacturers as he had done prior to the war.

11. During the month of January 1946, plaintiff advised defendant that he was unwilling to sever his connections with other manufacturers and was therefore unwilling to accept either of the positions offered him by defendant.

12. Thereafter and during the month of March 1946 plaintiff took up with the Selective Service System the matter of his claim for reinstatement with defendant.

13. Plaintiff was informed that the Office of the Director of Selective Service for the State of California had conferred and corresponded with defendant during or about the months of August, September and October 1946 regarding plaintiff's claim for reinstatement, and that the defendant refused to renew plaintiff's prewar status.

14. The United States Attorney in Chicago, Illinois did not file suit against defendant on behalf of plaintiff to enforce plaintiff's claim for reinstatement, and turned the file concerning such claim over to plaintiff in February 1948.

15. During or about February 1948 plaintiff consulted the law firm of Arvey, Hodes and Mantynband of One La Salle Street, Chicago, Illinois, regarding the plaintiff's claim for reinstatement.

16. On or about November 4, 1948, the law firm of O'Melveny & Myers of 433 South Spring Street, Los Angeles, California, as attorneys for defendant, in a letter sent to said firm of Arvey, Hodes and Mantynband, rejected, on behalf of defendant, plaintiff's said claim for reinstatement, and the contents of such letter were made known to the plaintiff on or before December 1, 1948.

17. An action was filed by plaintiff against defendant in the United States District Court for the Northern District of Illinois on or about July 22, 1949, to enforce plaintiff's asserted right to reinstatement, which action was dismissed without prejudice on or about September 20, 1949, for want of jurisdiction over defendant in the Northern District of Illinois.

18. The geographical limits of the territory in which plaintiff formerly had been authorized to sell defendant's products have been further revised from time to time since January 1946 and such territory now comprises the States of Kansas and Missouri, that portion of Nebraska east of the extension of the Colorado eastern border, certain

counties in Illinois, and all of Iowa except certain counties therein. Each of the areas eliminated from time to time from said territory has been made a part of another of defendant's sales territories.

19. At the present time three salesmen employed by defendant are handling the sale of defendant's products in the territory referred to in the preceding paragraph. At all times since January 1946 the sales of defendant's products in plaintiff's former territory have been handled by at least two salesmen employed by defendant, and during one period since that date four salesmen were employed by defendant to handle such sales in said territory; and at all such times such salesmen have handled the sale of no products other than those of defendant and its said subsidiary corporations.

20. During the period from January 1946 to September 22, 1949, the date of the commencement of this action, defendant has paid large and substantial sums of money to salesmen employees as compensation for selling defendant's products in the territory in which plaintiff was formerly authorized to sell such products.

21. During the period from the date of plaintiff's release from the naval forces of the United States in December of 1945 to January 23, 1950, plaintiff rendered services to the following firms or corporations in the sale of their products, during the respective periods specified below and received from said respective firms or corporations as compensation for personal services the respective amounts set forth below:

Names and Addresses	Date of Employment	Gross Receipts
Wohlert Corporation Lansing, Michigan	Jan. 1, 1946, to date	\$51,040.67
Eis Automotive Corp. Middletown, Conn.	Jan. 1, 1946, to date	20,606.55
Powell Muffler Company Utica, New York	Jan. 1, 1946, to date	5,090.29
Precision Universal Joint Co., Chicago, Illinois	Jan. 1, 1946, to Nov. 1947	1,334.00
Pep Manufacturing Co., New York, New York	Jan. 1, 1946, to Feb. 1949	1,836.71
Warehousing Service Co., Chicago, Illinois	Jan. 1, 1947, to March, 1949	1,925.24
Hygrade Products Co., New York, New York	March 1947, to January 1948	1,054.36
U. S. Axle Company Pottstown, Pa.	Jan. 1946, to date	2,305.59
Buell Mfg. Company Chicago, Illinois	April 1948, to date	4,597.65
Bingham Herbrand Corp., Fremont, Ohio	March 1949, to date	1,757.99
TOTAL GROSS RECEIPTS		\$91,549.05
Less Commissions to other salesmen		7,787.60
RECEIPTS		\$83,761.45

The phrase "to date" in the foregoing tabulation refers to the date of January 23, 1950.





APPENDIX B.

[Title of District Court and Cause.]

SUPPLEMENTAL STIPULATION OF FACTS.

(Plaintiff's Exhibit 51.)

IT IS HEREBY STIPULATED by and between the parties hereto, through their respective counsel of record, that the evidence in the above-entitled cause shall be deemed to have been opened by the Court upon motion of the plaintiff; that the plaintiff shall be deemed to have offered evidence of the facts hereinafter set forth; that the defendant shall be deemed to have objected to the introduction of such offered evidence on the ground that the same was irrelevant and immaterial; that such objection shall be deemed to have been overruled by the Court; and that competent evidence of the following facts shall be deemed to have been received by the Court as a part of the record in the above-entitled cause:

1. The gross sales made by the defendant during the year 1946 to customers located in the State of Minnesota and in the Counties of Brown, Beadle, Sanborn and Bonhemme in the State of South Dakota (being the portion of plaintiff's territory as constituted in 1942 which was not included within defendant's Kansas City Territory as constituted in 1946) amounted to \$208,000.

2. During the year 1946 defendant employed two full-time salesmen for the purpose of selling its products and merchandise in Minnesota and the aforesaid counties of South Dakota, and during 1946 defendant paid to said

salesmen compensation equal to $7\frac{1}{2}\%$ of the gross sales mentioned above, which compensation amounted to \$15,600.

3. The so-called "buy-outs," with respect to which plaintiff was entitled to receive only an 8% commission under his contract with defendant in effect at the time of his entry into military service [Exhibits 15, 16 and 19] constituted 8.53% of defendant's gross sales in 1946 both in defendant's Kansas City Territory as then constituted and in Minnesota and the South Dakota counties referred to above.

IT IS FURTHER STIPULATED that this supplemental stipulation of facts may be filed and received in evidence in the above-entitled cause; provided, however, that nothing herein contained shall be construed as a waiver by defendant of its objection to the admissibility in evidence of the foregoing facts as noted above.

Dated: January 22, 1951.



APPENDIX C.

(Exhibit 15.)

CONTRACT.

I, LIONEL H. SANGER, of 1729 McGee Street, Kansas City, Missouri, do hereby make application to The Plomb Tool Company, of Los Angeles, California, hereinafter called the "Company," for the franchise or right to sell merchandise of the Company for the period from January 1, 1941 to December 31, 1941, inclusive, according to the following conditions and provisions:

1. The merchandise to be sold hereunder will be that supplied by the Company and included in the regular general catalog of the Company and such other merchandise as may hereafter be mutually agreed upon.

2. I shall offer the said merchandise for sale only to those Automotive Jobbers, Industrial Jobbers, Wholesale and Retail Hardware Jobbers, Plumbing and Air Conditioning Jobbers, whose credit standing the Company shall have first approved.

3. The territory in which I shall operate will be the following and no other: The States of Iowa, Kansas and Missouri; Nebraska (east of the extension of the Colorado eastern boundary); the State of Minnesota; the following Counties in the State of South Dakota: Brown, Beadle, Sanborn and Bonhemme, and Rock Island, Illinois.

4. I further undertake to use all reasonable effort which may assist the Company in collecting accounts arising out of my sales hereunder; and I further agree to use all reasonable diligence in maintaining display boards and other property of the Company placed in my possession or under my care with my permission, and to account to the Company for said property upon its demand therefor.

5. I hereby declare that I believe that close cooperation between the Company and myself will operate to the advantage of both parties in developing business hereunder through which both parties will profit directly. I therefore further declare that I shall conduct my operations hereunder so as to maintain and increase the good will and reputation of the Company both inside and outside the territory within which I operate; and I further declare that I shall give earnest and cooperative consideration to such information and suggestions concerning desirable results to be obtained as the Company may from time to time transmit to me; and I further declare that I shall not, during the existence of this contract, become concerned in any way with the sale of other products, without first consulting with and obtaining written permission from the Company.

6. By its acceptance of this application the Company agrees:

- (a) To use all reasonable efforts to collect accounts receivable arising out of my sales under this agreement.
- (b) To furnish for my assistance all sales promotion and advertising material it furnishes to other contractors similar to myself, of kind and quantity appropriate to the status of my operations hereunder.
- (c) To pay to me by the 25th of each month the following commissions, based on all moneys arising out of sales to customers in my charge and collected and received by the Company during the preceding month: On sales of current standard stock Plomb tools at current catalog prices and discounts (subject to exceptions here following) a commission equal to twelve and one-half per cent ($12\frac{1}{2}\%$);

on adjustable wrenches and pliers, ten per cent (10%); on so-called "Buy-Outs," five per cent (5%). On sales of the above described tools at less than the said prices, and on sales of any Company product other than those covered hereunder, and on sales in said territory to other than the classes of purchasers herein described to be my customers, the Company may base an allowance of commissions to me, if in its discretion the same are warranted, according to the conditions and circumstances of each such sale. The Company agrees to make no sales of specified merchandise, to specified purchasers, in the specified territory, as per paragraphs 1, 2, and 3 hereof, without crediting to me the foregoing commissions.

7. It is understood by and between both parties hereto that this application and agreement expresses the entire contract between the parties hereto and that nothing shall be considered a part hereof unless agreed to by both parties in writing.

8. This agreement may be cancelled by either party hereto upon thirty (30) days' notice in writing mailed to the other party at his/its last known address. After the termination of this contract I shall not use to the advantage of myself or any other person, firm or corporation any confidential information gained from the files or business of the Company.

9. No waiver by either party hereto of any provision hereof shall amount to a waiver of such provision in the future.

10. Performance of either party hereto shall be excused when occasioned by act of God; but I agree that if I shall

suffer any disability which may reasonably be assumed to prevent my performance as contemplated under this contract, the Company shall have the right to suspend this contract forthwith, and to take such measures as the Company may consider necessary to protect its interests in the territory herein described.

11. Nothing herein contained shall be construed to create any relationship of employer and employee between the Company and me or to vest in me any power or authority to engage employees of any kind on behalf of the Company or to obligate the Company in any manner, or to vest in the Company any right or power to control the means or manner of accomplishing the results herein contemplated. It is distinctly understood that in order to achieve said results I am to select and use my own methods and means, including the personnel of my assistants and employees, if any, to operate hereunder at my own risk and expense, and to hold the Company free and harmless from any and all liability resulting from my operations hereunder; provided, however, that said work shall be done in such manner as will be consistent with the achievement of the result contracted for, at the time or times herein specified.

Signed this 18th day of January, 1941.

LIONEL H. SANGER.

Accepted:

THE PLOMB TOOL COMPANY,

By D. STEVENS.





APPENDIX D.

(Exhibit 15.)

SUPPLEMENTAL TERRITORIAL AGREEMENT.

As of February 1, 1941, the paragraph listed below will supersede paragraph "C" in the attached sales agreement.

c. To pay to me by the 25th of each month the following commissions, based on all moneys arising out of sales to customers in my charge and collected and received by the Company during the preceding month: On sales of current standard stock Plomb tools at current catalog prices and discounts (subject to exceptions here following) a commission equal to twelve and one-half per cent ($12\frac{1}{2}\%$); on adjustable wrenches and pliers and on so-called "buy-outs," eight per cent (8%). On sales of the above described tools at less than the said prices, and on sales of any Company product other than those covered hereunder, and on sales in said territory to other than the classes of purchasers herein described to by my customers, the Company may base an allowance of commissions to me, if in its discretion the same are warranted, according to the conditions and circumstances of each such sale. The Company agrees to make no sales of specified merchandise, to specified purchasers, in the specified territory, as per paragraphs 1, 2 and 3 hereof, without crediting to me the foregoing commissions.

Signed this 19th day of March, 1941.

LIONEL H. SANGER.

Accepted:

THE PLOMB TOOL COMPANY,

By D. STEVENS.



APPENDIX E.

(Exhibit 16.)

December 8, 1941

Mr. Lionel H. Sanger
1817 McGee Street
Kansas City Missouri

Dear Lionel:

The contract which exists between us and under which you sell our tools as an independent contractor will expire at the end of this year. It is our wish to continue this contract.

We therefore propose that the said contract be continued in full force and effect for a further period of one year, to expire December 31, 1942, upon the same terms and conditions with the exception that Paragraph 6 (c) be amended to read as follows:

6. (c) To pay to me by the 25th of each month the following commissions, based on all moneys arising out of sales to customers in my charge and collected and received by the Company during the preceding month: On sales of current standard stock Plomb tools at current catalog prices and discounts (subject to exceptions here following) a commission equal to twelve and one-half per cent ($12\frac{1}{2}\%$); on adjustable wrenches and pliers and on so-called "buy-outs," eight per cent (8%). On sales of the above described tools at less than stated prices, or on sales of any company products other than those covered herein, or on sales in said territory to other than the classes of purchasers herein described to be my customers, or on any sales made under contract, or supply bids to the United

States Government or any of its departments, or on sales to manufacturers or for the purpose of servicing their products, the Company may base an allowance of commissions to me, if in its discretion the same are warranted, according to the conditions and circumstances of each such sale. The Company agrees to make no sales of specified merchandise, to specified purchasers, in the specified territory as per paragraphs 1, 2 and 3 hereof, without crediting to me the foregoing commissions.

If the foregoing is satisfactory to you, will you please so indicate by signing both copies of this letter agreement in the space provided below, attach one copy to your copy of the contract above-mentioned and return one copy to us for the same purpose.

THE PLOMB TOOL COMPANY,
By D. STEVENS.

Accepted and agreed to this 16th day
of December, 1941.

LIONEL H. SANGER.

No. 12873.

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

THE PLOMB TOOL COMPANY, a corporation,
Appellant,
vs.
LIONEL H. SANGER,
Appellee.

APPELLEE'S BRIEF.

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No. 12873.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE PLOMB TOOL COMPANY, a corporation,

Appellant,

vs.

LIONEL H. SANGER,

Appellee.

APPELLEE'S BRIEF.

STATEMENT OF JURISDICTION.

Appellee adopts the statement of jurisdiction contained in Appellant's Opening Brief, pages 1 and 2.

STATEMENT OF THE CASE.

INTRODUCTORY.

By this action, commenced September 22, 1949, appellee Sanger sought a mandatory injunction compelling his reinstatement in the employ of the appellant, the Plomb Tool Company, a corporation, hereinafter referred to as Plomb, and for incidental damages sustained from loss of wages, commissions and benefits due to Plomb's denial of Sanger's application for reinstatement made within 90 days after Sanger was relieved, in December, 1945, from services in the naval forces of the United States.

The trial court ordered Plomb to reinstate Sanger as its sales manager in the Kansas City territory [R. 20] and found that Sanger was entitled to recover \$79,475.05 as damages from Plomb with 7% interest from January 1, 1947, less tax withholding and other deductions required by law [R. 18].

THE FACTS.

1. Sanger Joins the Plomb Sales Force in 1932.

In 1932 at the National Automobile Parts Show in Chicago, the appellee Sanger met James Durham, Plomb Tool representative for the mid-west territory. Durham told Sanger that he wanted to dispose of part of the mid-west territory and that there were no customers at that time in Kansas, Iowa, Nebraska and Missouri. Durham introduced Sanger to E. D. Moore, then sales manager for appellant Plomb. Moore told Sanger that he would hire him and that he would see if he could obtain some financial assistance in the way of other lines because the Plomb Tool Company was not in a position to incur the expense of new salesmen [R. 29-31, 164].

2. Plomb Arranges for "Other Lines" to Help Carry Sanger.

Moore made an arrangement whereby Sanger would get the Wohlert line and a few other small lines to carry him [R. 31].

In 1933 Sanger received \$341.42 from Plomb, \$2,510.69 from the Wohlert Corporation, \$369.93 from New England Auto Products and \$53.87 from Liberty Accessories. The latter three concerns are manufacturers of automotive parts, not tools [R. 33].

This arrangement was in line with industry practice. Morris Pendleton, president of appellant Plomb Tool Company, testified at the trial as follows:

“When companies are small and their customers are limited and their sales volume is small, it is very common in the tool business of various sorts for sales to come through manufacturers’ agents; and, as a matter of neighborliness, if several companies have a territory in which they want representation, for them to jointly use the same person to represent them.”
[R. 164.]

3. From 1932, Until He Entered the Navy, Sanger’s Relationship With Plomb Is Unchanged.

From 1932 to November 1942, Sanger sold Plomb merchandise on a commission basis in the following territory: Kansas, Iowa, Minnesota, Missouri, Nebraska (east of extension of the Colorado eastern boundary), South Dakota (Brown, Beadle, Sanborn and Bonhomme Counties only), and the city of Rock Island, Illinois [Finding III, R. 12]. He brought in every account in the territory except one and built up his sales volume every year [Ex. 31, R. 65].

Until 1938, Sanger never had any written contract with Plomb [R. 39]. In the 1938 contract [Ex. 7] he was denominated a “salesman”; in the 1939 contract [Ex. 8], he was a “representative”; and in 1942 he was described to the United States Government by Mr. Pendleton as having been “district manager for Plomb Tool Company” for many years [Ex. 22, R. 52, 180]. On December 11, 1942, the chairman of the Board of Directors of Plomb also informed the government that Sanger “had been employed” by Plomb for over ten years [Ex. 24, R. 55].

Plomb's relationship with Sanger before he went to war was summarized at the trial as follows:

"The Court: There was no change in the arrangement, so far as you know, from the time he first came into the company until he went into the service?"

Mr. Pendleton: No." [R. 166.]

Mr. Pendleton was shown Exhibit 7 (the 1938 "salesman" contract) and Exhibit 8 (the 1939 "representative" contract) and he said:

"The use of 'salesman' in one case and 'representative' in the other case is purely a choice of words, and did not in any way alter the relationship between the company and Mr. Sanger." [R. 167.]

In 1939 and in subsequent years Plomb consistently referred to Sanger's status as being that of a salesman [Exs. 2, 3, 4, 5, 6, R. 36-37].

In December, 1939, Plomb paid Sanger's expenses to attend a sales meeting in Los Angeles [R. 44]. On February 20, 1940, the vice-president of Plomb told Sanger that he was a "very 'top string' salesman" [Ex. 12, R. 45].

On April 8, 1940, at a "Family Day Party," Plomb conducted a presentation of service pins to Plomb Tool "employees" and Sanger received one of these service pins [Ex. 13, R. 46, 184].

On April 10, 1940, Plomb sent Sanger a list of new jobbers in his territory in a letter addressed to all "salesmen" [Ex. 14, R. 46].

Shortly prior to September 9, 1942, Plomb deducted money from Sanger's commissions and used it for a donation to a clubhouse built for the employees of Plomb. A letter from the president of the Plomb Employees' Asso-

ciation dated September 9, 1942, stated that Sanger's name was going to be on a plaque at the clubhouse [Ex. 17, R. 49, 183].

4. Sanger Performed a Multiplicity of Tasks for Plomb.

Sanger always kept on the road; he never had a desk since 1932. He merely used a mail forwarding service from the warehouse where the Plomb Tool stock was carried [R. 79]. Sanger never paid for an office in his life. All he had was mail forwarding; he never had a chair, desk, or anything like an office [R. 82, 102].

Sanger made suggestions to the company to improve their sales [R. 84]. He assisted the designing of many special tools [Ex. 22, R. 181].

Plomb furnished Sanger stationery with its name on it [R. 85].

Plomb requested Sanger to make reports to it concerning his itinerary and costs. From time to time Plomb furnished Sanger names of prospective customers in his territory and Sanger reported to Plomb regarding them. Plomb requested Sanger to report on his activities in collecting past due accounts [Ex. 50; App. Br. VI-E, 4].

Sanger's duties even included repair and maintenance work. He testified as follows:

"It was up to me as a salesman to keep that board in repair and clean. In other words, about once or twice a year, depending on the dust storms we had, all the tools would have to come down, those boards be washed and wiped off, sometimes revarnished and new brackets for new numbers of tools that were manufactured be installed on those boards." [R. 102].

Sanger did this work and was furnished a complete tool kit with varnish and paint and brackets by Plomb Tool Company. He was given another kit to repair broken tools that the jobbers would give him on regular calls [R. 102].

5. On January 1, 1942, Plomb Converted to a Direct Sales Program but Expressly Left Unchanged the Status of Sanger and Two Others.

Plomb's original practice of using salesmen with multiple lines [described in paragraph 2, *supra*] ceased on January 1, 1942 [R. 161, 168].

This decision expressly exempted three salesmen from its scope: Neil Jones, of North Carolina (ultimately fired in 1944); Jack Schrenker, of Pittsburgh, and Sanger [R. 171]. These three were permitted to follow the old practice of selling other lines.

Mr. Pendleton testified that the decision to make this change was reached in the fall of 1941 [R. 168]. There is simply no support in the record for appellant's statement in its opening brief (p. 55) that Sanger was excepted from the new selling policy because Plomb "knew he would shortly leave for service in the armed forces and did not wish to impose upon him the inconvenience entailed in such a change-over."

If this were true it would constitute the only display of consideration by Plomb for Sanger in the entire record.

However, it was not true. The decision to change was reached even before Pearl Harbor. The real explanation lies in the figures of Sanger's earnings. By 1941, the plan of carrying him in the new mid-west territory by permitting him to sell other lines was only beginning to show

results. Up to that year the other lines had produced more commissions than the Plomb line [R. 98].

Sanger's exception (and probably Schrenker's too) only resulted from the fact that Plomb would have lost a good salesman if it had insisted upon his surrendering half of his income when the development of Plomb's volume in the mid-west territory was still in its embryonic stage.

6. In November, 1942, Sanger Joins the Navy.

Sanger went into the Navy in November, 1942 [Finding IV, R. 13]. He was the only Plomb salesman to go to war [R. 193].

Sanger reminded Plomb on November 19, 1942, that it was planned, although not definitely decided that he would be paid a year's commission after he went into the service [Ex. 23, R. 53].

Plomb did not confirm this agreement but on December 24, 1942, Plomb wrote Sanger that they would like to have his picture for their house organ and said that Sanger was to get one-half of his commission for a period of three months [Ex. 25, R. 55].

Sanger's other lines paid him full commissions all of the time he was at war [Ex. 1, R. 68]. The record is silent as to whether they asked for his picture. However, letters written to Plomb while Sanger was in the service were published in the latter's house organ [Ex. 26, R. 55] and Plomb wrote Sanger again on December 31, 1942, asking for a picture of him in his uniform to be printed in their house organ [Ex. 27, R. 56].

7. In 1943-1945, Plomb Enjoys a Great Wartime Prosperity.

During the war Plomb had a phenomenal growth, increasing its annual volume from \$1,000,000 to \$14,000,000 [R. 145].

The Kansas City territory contributed more than its proportionate share to the increase in the company's volume during the war [R. 158].

8. In May, 1945, Sanger Starts His Postwar Planning, but Meets With a Cold Reception.

On May 15, 1945, Sanger wrote Plomb to inquire about the possibility of his postwar reemployment [R. 58]. Plomb took over two months to reply to this letter and then only replied after a personal reminder that a reply was due. This reply, dated July 20, 1945 [Ex. 28, R. 57] contained the following paragraph:

“Without knowing when you will be out of the service it is difficult to talk of possibilities of your again representing Plomb. As you know, the men who have taken over the territories formerly covered are direct employees of Plomb. *As a matter of fact we have only one manufacturer's agent left in our entire picture, and that is Jack Schrenker* in Pittsburg who has two men working with him, his brother and another chap who is devoting most of his time to Plomb. In general I would say that our experience has been such that we will probably never go back to the old method.”

The writer of this letter, Mr. R. W. Kerr, vice-president and sales manager of Plomb, had been advised [R. 142] that it was the company's position that Sanger was not entitled to any reinstatement rights as a veteran [R. 152; App. Op. Br. 7].

However, when he wrote the above letter, Exhibit 28, to Sanger while he was in the service, Mr. Kerr did not then tell him that the company had taken this position in respect to him.

“I had no occasion to,” Mr. Kerr explained at the trial [R. 155].

9. Plomb “Welcomes” Sanger to Civilian Life.

Sanger’s terminal leave from the United States Navy expired December 29, 1945 [Finding V, R. 13].

He came to Los Angeles and saw Mr. Kerr. Kerr told Sanger that there was an efficiency organization from the east working directly with Mr. Pendleton, president of Plomb, and that this organization had recommended that all Plomb representatives carry only one line [R. 61, 130].

Mr. Pendleton joined the conversation and when the matter was brought up of Sanger’s continuing to represent other firms with other lines, Pendleton said, “Well, we are certainly going to have to make some exception for you, Lionel.” [R. 61.]

Sanger told Mr. Kerr that he would drop the other lines if he were given time to give the other firms some notice, “because these firms had paid me while I was in the service and Plomb had not.” [R. 62, 132.] Otherwise, Sanger was willing to work for Plomb exclusively and in any territory where the company wanted him to work [R. 105].

Mr. Kerr said to Sanger: “Well, just drop them a note and tell that you have got something better, and that is all there is to it.” To this Sanger replied, “I just couldn’t do a thing like that. I was bound loyally to them. They were square with me for four years away, pretty near

four years, and I didn't feel that that was right." [R. 62].

The following day Kerr told Sanger that they were going to send for Mr. Freund (in charge of the Kansas City territory during the war) and that Sanger was to just stand by and call in every day. Mr. Kerr told Sanger that before any proposition to him could be made firm, which would involve a change in Mr. Freund's status, a discussion would have to take place with Mr. Freund [R. 129]. Sanger did call in every day and after about the seventh or eighth day he could not contact either Mr. Pendleton or Mr. Kerr and was informed that Mr. Pendleton had gone east without seeing him again [R. 215]. He finally reached Mr. Kerr around January 18th and was then told to return to Kansas City and keep in touch with them [R. 63].

On January 27, 1946, from Kansas City, Sanger wrote Mr. Kerr a letter [Ex. 29, R. 64] stating that he was "looking forward to hearing from you, so that I can again represent the Plomb Tool Company."

On January 31st Mr. Kerr replied to Sanger [Ex. 30] saying, "Sorry not to have had more time to visit with you while you were here, but you know the pressure under which we have been operating."

On February 10, 1946, Sanger replied with another letter to Mr. Kerr [Ex. 31, R. 65]. This letter is a recapitulation of Sanger's relations with Plomb, how he brought in every account in the midwestern territory and built up his volume of sales every year until he went into the Navy. In it he stated the following:

"My loyalty will not allow me to leave the other firms that I represent at this time to go with Plomb

exclusively. *I am going to give them representation at least until the first of the year."*

Further, he stated:

"I opened every account in the territory except Osiek, I serviced these accounts for a period of eleven years, my volume increased yearly. I was the only Plomb Tool representative to volunteer my services to my country, *my welcome back lies in your hands*. My other firms paid me throughout the war and one, as you know, gave me a check for \$1000 upon my return. I will wait in Kansas City for a return reply to this letter from you and I trust that same will be favorable."

Mr. Kerr came to Kansas City in March and had lunch with Sanger. He told Sanger that "Mr. Pendleton was still of the same opinion, that he was going to listen to this eastern research firm, and that there was nothing he could do but he would definitely let me hear from him and I would hear from either he or Morris Pendleton when he got back to California. I waited for that and never heard." [R. 66.]

10. Terms of Reinstatement Offer.

In his opinion, Judge Mathes said the offer made Sanger upon his return was not an offer of reinstatement and was not intended as such.

"In my view it falls short of being an offer of reinstatement to a position of like seniority, status and pay, (1) by reason of the indefiniteness of the commission rate, and (2) by reason of the fact that although one other salesman who had not entered the service was being permitted to handle other lines in another territory, that privilege which this plaintiff had enjoyed prior to the time he entered the service was to be denied him in the offer made." [R. 221.]

A. Indefiniteness of Commission Rate.

The offer was indefinite primarily because no definite compensation to Sanger could possibly be spelled out of Plomb's proposal to him.

As part of its offer, the company required "that two other salesmen be employed by the company to assist him (Sanger) in covering the territory and be compensated out of the commissions earned on sales in the territory." [App. Op. Br. 60-61; R. 124, 187.]

When questioned as to Plomb's practice in dividing commissions between salesmen, Joseph G. Leach, sales supervisor, testified:

"As Mr. Pendleton has testified, those rates varied between zones and at times, even down to men." [R. 205.]

The Court's own questioning of two witnesses established the indefiniteness of the offer:

"The Court: Did you discuss with him who was to pay these men?

Mr. Kerr: Well, in explaining the new program I undoubtedly explained how it was worked, which was done in all territories, your Honor, and that was, the earnings were pooled, then a division was made according to agreement between the district manager and the men and the company.

The Court: In other words, the territory yielded certain business.

Mr. Kerr: That is correct.

The Court: And certain commissions followed from that business?

Mr. Kerr: That is correct." [R. 155.]

“The Court: Who would determine how this 100 per cent of commissions was divided? Would the company be the final arbiter in the matter? * * * Suppose Mr. Sanger had accepted this proposition and he picked two highly compatible men and he said: ‘Well, now, gentlemen, I want 70 per cent, not 7½. I will give each one of you 15 per cent.’ Both of them would have said no, they would not do that. Who is going to decide that dispute?

Mr. Pendleton: That would be a possible situation. The company then enters the proposition. The two men that were offered 15 per cent would say, ‘No; we can’t make it on that small a cut.’ Then there would be no employees because they would not take the job.” [R. 190.]

“The Court: Would it be accurate to say that the ultimate authority in determining the amounts or proportion of this seven and one-half per cent which Mr. Sanger would receive would be the company?

Mr. Pendleton: In the final analysis, if there were an impasse, the company would have to determine that division.” [R. 189-192.]

B. Throughout All of 1946 Plomb Continued Permitting a Stay-at-Home Salesman to Handle Other Lines.

In January, 1946, all of the sales representatives of the company were on an employee full-time basis except Jack Schrenker in the Pittsburgh area. Mr. Kerr said, “I had been putting the pressure on him at that time to change over and, as a matter of fact, told him that it would have to be done very shortly.” Schrenker had two small tool lines related to what Plomb had [R. 136], but Sanger never sold any tools that were competitive to Plomb [R. 105].

Schrenker was not in service [R. 137].

Mr. Kerr stated that the following passage contained in Exhibit 35 was substantially correct:

“They stated that Schrenker was permitted to continue *on the old basis* at his request, but that at the end of his present contract, which will coincide with the end of this year, he will be required to comply with the present policies and rules, or he will not be allowed to handle the line.” [R. 140.]

Mr. Schrenker was permitted to carry other lines to the end of 1946 and Mr. Kerr admitted that this was the identical period which Sanger had requested to do the same [R. 140, 141].

C. Territorial Area Is Reduced.

The Kansas City territory that was offered Sanger after the war excluded a part of the Dakotas and Minnesota [R. 153, 186]. That this area was “whittled off” is conceded (App. Op. Br. 71).

However, before the war, Sanger had brought in the first Iron Stores account in Minnesota [R. 147]. The Iron Stores account ultimately became a big one [R. 148].

There was some testimony concerning an alternative offer involving the Chicago territory [R. 186]. However, Sanger denied that either Mr. Kerr or Mr. Pendleton told him he could have the Chicago territory, plus his old line. He said such an offer would be ridiculous because of its unworkability [R. 215]. Mr. Kerr also said that Sanger’s refusal of the Chicago territory offer was based upon its

unfeasibility [R. 144]. In any case, Chicago was not comparable in sales volume to Kansas City. In his last pre-war year, 1942, Sanger produced 5.2% of Plomb's gross business out of the Kansas City area and even in 1946, the Chicago area only produced 4.2% [R. 195].

11. 1946 Earnings for Plomb Reach a New High.

In 1946, Plomb began to reap the post-war harvest that Sanger and millions of other veterans had made possible by their sacrifices.

1946 was the highest year's volume that Plomb ever had in the Kansas City territory [R. 176, 183]. In that banner year, tool manufacturers did not need salesmen, they only needed order-takers.

1946 was the year Plomb was selling tools to government GI schools then opening up for the purpose of training veterans [R. 183].

Another part of the additional volume came from jobbers who were replenishing their stocks that had been depleted during the three preceding war years [R. 183], but these orders all came to Plomb from accounts originally established by Sanger [Ex. 31].

These two factors, among others, account for the fact that the Plomb income in Kansas City jumped from \$136,000 in 1942 [R. 175] to \$737,000 in 1946, and dropped back to \$295,000 by 1949 [R. 183]. However, Mr. Pendleton attempted to explain this drop in sales [R. 196] by saying that in 1949 the company spent most of the year recovering from the adverse effects of litigation with respect to a trademark.

In the record there is some testimony concerning some subsidiary lines developed by Plomb. However, Mr. Kerr

admitted that the Challenger line made by Penens, one of the subsidiaries, was not developed until the summer of 1946 and that the J. P. Danielson merger did not occur until late in 1946 or 1947, after Plomb was through dealing with Sanger [R. 160].

The real postwar growth in volume in 1946 was in the tool business, and not in Sanger's other lines. In 1941 and 1942, before Sanger left Plomb's employ to enter the U. S. Navy, \$20,244.49, or 43.7% of his income was derived from his other lines [Pretrial Stipulation; Ex. 50, Par. 6-C, Appendix, App. Op. Br. 3].

In 1946 Sanger's gross commissions from his other lines only increased to \$25,968.00 [R. 99], or only 24.8% of his total gross income if there be added thereto his putative 1946 gross earnings of \$79,475.05 from Plomb, as awarded him by the judgment [R. 16].

Nevertheless, the trial court in its judgment refused to award Sanger anything for his loss of the Plomb commissions earned in his territory in the years 1947, 1948, 1949 and 1950, and even required Sanger to credit Plomb with \$34,043.45 to pay the 1946 commissions to the additional salesmen which Plomb had installed in his old territory during the war [R. 16].

Although there was testimony to the contrary, Sanger maintained that carrying other lines in addition to Plomb's tool line required no additional men or manpower, Sanger said that the determining factor was the distance between towns in the territory.

"I had carried the Plomb Tool Company line along with the parts lines since 1931, and I believe I showed an increase practically every year on the Plomb Tool Company. When I started there they had no customers, and in most cases after calling on one cus-

tomor in the morning, at the best, and another one in the afternoon, when you once get away from the larger cities like St. Louis, Kansas City, Omaha, time doesn't mean much because there is too much distance involved to make the next town. So therefore that time is used and there is actually no further effort required than to sell more than one line.

Q. In other words, as you go into a small town you have got to devote that whole day to that town, anyway; you have gone that far and that time is spent in offering all the lines that you have? A. Yes, sir" [R. 218].

After the war, Sanger was never able to re-establish himself as a tool salesman. He testified:

"I tried to sell other tools since I was not re-employed, but it is pretty hard to do when I spent practically my whole life building Plomb. I go around and just can't seem to sell the others. * * * I just don't seem to be able * * * to show reason enough why they should discontinue Plomb, because I was sold on Plomb myself and I still think it is the best tool manufactured" [R. 104].

12. Sanger Seeks to Establish His Claim for Reinstatement Under the Selective Service Law.

In March, 1946, Sanger took up his claim for reinstatement with the Selective Service System and the United States Attorney in Chicago, Illinois [Findings VII, VIII, and IX; R. 14].

Sanger wrote from Chicago to Lieut. Col. Kenneth H. Leitch, Director of Selective Service for California, on June 7, 1946, saying:

"In view of the fact that my employer, the Plomb Tool Company, is licensed to do business in Illinois

and has its registered agent, the C. T. Corporation System at 206 S. La Salle Street, Chicago, Illinois, the local D. A. here has informed me that the suit can be filed here rather than in California" [Ex. 34].

However, the United States Attorney in Chicago did not file suit for Sanger against Plomb, and in February, 1948, turned the file over to Sanger who, in the same month, gave the matter to Arvey, Hodes and Mäntynband, a Chicago legal firm [Findings IX and X; R. 14].

The Arvey firm in Chicago first wrote to Plomb's lawyers in Los Angeles, O'Melveny and Myers, on February 28, 1948 [Ex. 38].

On March 3, 1948, Plomb's lawyers merely acknowledged receipt of this letter and promised Arvey that they would be further advised [Ex. 39].

Approximately two months went by and then on April 26, 1948, Plomb's lawyers wrote to Arvey that the executives of Plomb had been so busy with the problems of reorganization that full and proper consideration had not yet been given to Arvey's letter of February 26th [Ex. 40].

May and June then went by and on July 1st Arvey wrote the O'Melveny firm again, requesting a final determination by Plomb one way or the other [Ex. 41].

The months of July and August and most of September then elapsed and finally on September 23rd, Arvey wrote another follow-up letter to O'Melveny's firm requesting a decision [Ex. 42].

On September 27th the O'Melveny firm wrote to inform Arvey that a reply would be forthcoming by mid-October [Ex. 43].

Most of October came and went without a further reply from O'Melveny's firm and finally on October 26th Arvey wrote again requesting a reply [Ex. 45].

It was only on November 4, 1948, that Arvey was able to get a definite reply from Plomb's lawyers [Ex. 46] rejecting Sanger's claim to reinstatement [Finding XI, R. 14].

The Chicago lawyers brought suits for Sanger in the United States District Court for the Northern District of Illinois on July 22, 1949 [Finding XII, R. 15].

Plomb's license to do business in the State of Illinois was revoked by the Secretary of State of Illinois on July 1, 1949, and its registered agent resigned on August 4, 1949, five days before service was made on said agent, to-wit, on August 9, 1949 [Sanger's affidavit of April 8, 1950, filed with Exs. 33 to 47, R. 70].

As a result, Sanger's action in Illinois was dismissed without prejudice on September 20, 1949, and this present action was brought by him against Plomb in the United States District Court, Southern District of California, Central Division, on September 22, 1949 [Findings XII and XIII, R. 15].

The trial court expressly found that Sanger was not guilty of laches by reason of his failure to commence this particular action sooner than he did. The trial court also found that the delay in filing this suit was contributed to by Plomb, and that Plomb suffered no prejudice by reason of delay [Finding XIV, R. 15]. A written opinion on this point was filed by the trial court on May 17, 1950, in denying defendant's motion for summary judgment.

13. The District Court Upholds Congress' Promise to the Veteran.

On January 9, 1951, in his oral opinion, Judge Mathes said:

"I find that what had been *promised by the law* to the plaintiff was a commission on all sales of the Plomb Tool Company in the Kansas City territory as constituted prior to the entry of the plaintiff into the service, at the commission rate then paid him plus what he would have earned and did earn by handling of other lines as was his practice at the time he entered the service, less his expenses which he customarily paid prior to entering the service" [R. 222].

Summary of Argument.

A. APPELLEE'S ACTION WAS ONE OF EXCLUSIVELY EQUITABLE COGNIZANCE, BROUGHT TO ENFORCE A FEDERALLY-CREATED RIGHT, AND THEREFORE COULD NOT BE BARRED BY A STATE STATUTE OF LIMITATIONS.

1. THE ACTION WAS OF EXCLUSIVELY EQUITABLE COGNIZANCE.

2. ACTIONS FOR DAMAGES ONLY, MUST BE DISTINGUISHED.

B. APPELLEE'S CLAIM WAS NOT BARRED BY LACHES AND THE DELAY IN FILING SUIT WAS CONTRIBUTED TO BY APPELLANT, WHO SUFFERED NO PREJUDICE.

1. THE ACT ITSELF ENCOURAGES DELAY FOR NEGOTIATIONS AND SUCH DELAYS ARE THEREFORE NOT UNREASONABLE.

2. THERE BEING NO STATE CAUSE OF ACTION FOR REINSTATEMENT AGAINST A PRIVATE EMPLOYER, ONLY ONLY FEDERAL EQUITABLE PRINCIPLES OF LACHES APPLY AND NO STATE LIMITATIONS CAN BE TAKEN INTO CONSIDERATION.

C. THE FINDING THAT APPELLEE LEFT A POSITION IN THE EMPLOY OF THE APPELLANT WAS ABUNDANTLY SUPPORTED BY THE EVIDENCE AND WAS REQUIRED BY A CONSTRUCTION OF THE ACT TO EFFECTUATE ITS REMEDIAL PURPOSE.

1. THE ACT WAS NEVER INTENDED ONLY TO PROTECT VETERANS ON REGULAR PAYROLLS.

2. THE "MISCHIEF-REMEDY" RULE SHOULD BE APPLIED TO CONSTRUCTION OF THE SELECTIVE SERVICE ACT.

3. THE FINDING THAT SANGER WAS NOT AN INDEPENDENT CONTRACTOR WAS ABUNDANTLY SUPPORTED BY THE EVIDENCE AND SHOULD BE UPHELD UNDER 52A OF F. R. C. P.

D. THERE WAS NO CHANGE IN APPELLANT'S CIRCUMSTANCES AND NO OFFER WAS EVER MADE APPELLEE OF A POSITION OF LIKE SENIORITY, STATUS AND PAY.

1. PLOMB'S POST-WAR PROFITS WERE NOT A LAWFUL "CHANGE OF CIRCUMSTANCE."

2. THE OFFER OF A CHANGED TERRITORY WAS NOT COMPARABLE TO SANGER'S PRE-WAR TERRITORY.

E. FAILURE TO RESTORE THE VETERAN IS A CONTINUING VIOLATION FOR WHICH THE PROPER REMEDY IS RESTORATION, WITH DAMAGES RUNNING, WITHOUT LIMITATION, UP TO THE TIME OF RESTORATION.

1. RIGHT TO COMPENSATION RUNS FROM DATE OF APPLICATION FOR REEMPLOYMENT.

2. THE DAMAGES AWARDED APPELLEE FALL FAR SHORT OF THE MAXIMUM THAT COULD HAVE BEEN AWARDED.

F. FINDINGS OF FACT SHOULD NOT BE SET ASIDE UNLESS CLEARLY ERRONEOUS.

ARGUMENT.

A. Appellee's Action Was One of Exclusively Equitable Cognizance, Brought to Enforce a Federally-Created Right, and Therefore Could Not Be Barred by a State Statute of Limitations.

The questions which the appellant has raised here under Point A of its opening brief (pp. 23-31) were raised in the trial court upon a summary judgment motion and were disposed of in appellee's favor by Judge Mathes in an opinion, rendered May 16, 1950, holding:

"(1) That by this action, commenced September 22, 1949, plaintiff seeks a mandatory injunction compelling plaintiff's reinstatement in the employ of the defendant, and incidental damages allegedly sustained from 'loss of wages, commissions and benefits' due to defendant's denial of plaintiff's application for reinstatement, alleged to have been made within ninety (90) days after plaintiff was relieved, in December, 1945, from . . . service in the naval forces of the United States;

"(2) That plaintiff's action is brought 'under Section 7 of the Service Extension Act of 1941 (55 Stat. 628, 50 U. S. C. App. Sec. 357) and Section 8 of the Selective Training and Service Act of 1940 (54 Stat. 890, 50 U. S. C. App. Sec. 308), as amended,' and invokes the equity jurisdiction of this court pursuant to Section 8(e) of the latter Act (See *Oakley v. L. & N. R. R.*, 338 U. S. 278 (1949); *Fishgold v. Sullivan Dry Dock*, 328 U. S. 275 (1946); *Flynn v. Ward Leonard Electric Co.*, 84 F. Supp. 399, 400 (S. D. N. Y. 1949); *Strelitz v. Surrey Classics, Inc.*, 7 F. R. D. 101, 103 (S. D. N. Y. 1946); *Kay v. General Cable Corp.*, 63 F. Supp. 791 (D. N. J. 1946).)"

(1) **The Action Was of Exclusively Equitable Cognizance.**

Appellee respectfully submits that proceedings seeking an order of restoration to a position in private employment are not only to enforce an equitable right but are of exclusively equitable cognizance. (Vol. 1, Pomeroy on Equity Jurisprudence, 5th Ed., 189-191, 226.)

“Cases in which the remedy sought and obtained is one which equity courts alone are able to confer must, upon any consistent system of classification, belong to the exclusive jurisdiction of equity, even though the primary right, estate, or interest of the party is one which courts of law recognize, and for the violation of which they give some remedy” (p. 189).

In such actions the award of damages is merely ancillary to the equity jurisdiction.

That the action is exclusively equitable is also demonstrated by the fact that the Selective Service Act envisaged benefits which cannot be supplied by an award of damages in lieu of restoration.

The act has a dual purpose, to enable the veteran to regain his lost skill by its actual use on the job and to provide a stabilized income during the period of readjustment. Hence an award of damages is an inadequate remedy if reinstatement is desired. (*Dacey v. Bethlehem Steel Co.*, 66 Fed. Supp. 161 (D. Mass. 1946); *Kay v. General Cable Corp.*, 59 Fed. Supp. 358 (D. N. J. 1945); *Hall v. Union Light, Heat & Power Co.*, 53 Fed. Supp. 817 (E. D. Ky. 1944); *Byrd v. North American Aviation, Inc.* (S. D. Calif. 1948, 15 C. C. H. Labor Cases 73,920).) The veterans are to have employment privileges that will assure them equal opportunity with those who stayed home

and bettered themselves in civilian jobs (*Droste v. Nash-Kelvinator Corp.*, 64 Fed. Supp. 716 (E. D. Mich 1946); *Kephart v. United States*, 74 Fed. Supp. 578 (C. Cls. 1947), motion for new trial refused, 75 Fed. Supp. 1020 (C. Cls. 1948).) Thus restoration in addition to damages was ordered even as to an elective position, since the veteran is entitled to the opportunity of being continued in employment beyond the year during which he may not be discharged without cause (*Sunker v. Local No. 621* (E. D. Tenn. 1949—unreported), and *cf. O'Connor v. Yardley Golf Club* (E. D. Pa. 1948), 16 Labor Cases 64,892, affirmed, 171 F. 2d 40 (C. A. 3, 1948), where an annual contract was involved).

The legislative history of the 1940 legislation indicated that the Congress inserted the provision against discharge without cause with a view not merely to the re-training involved but desiring that the veteran shall have "established himself in a permanent position." 86th Cong. Rec. 10346, remarks of Congressman Van Zandt; *idem* 10445, where Congressman O'Toole said that if reemployment lasted six months (the period for which he was then seeking to initiate protection) it would probably last indefinitely.

(2) Actions for Damages Only Must Be Distinguished.

Appellant attempts to escape from his reasoning by citing *Walsh v. Chicago Bridge & Iron Co.*, 90 Fed. Supp. 322 (App. Op. Br. 24). However, the veteran in the *Walsh* case only sued for damages and did not invoke equity by seeking reinstatement. The law is clear that an action for a solely equitable remedy involving a federally-created right is not controlled by a state statute of limitations. (See "Limitations and the Federal Court,"

Blume and George, 49 Mich. L. Rev. (May, 1951), 937, 949.) The controlling case is *Holmberg v. Armbrrecht* (1946), 327 U. S. 392, from which the following quotation is taken at page 395:

“If Congress explicitly puts a limit upon the time for enforcing a right which it created there is an end of the matter. The Congressional statute of limitations is definitive. See, *e. g.*, *Herget v. Central Nat. Bank & T. Co.*, 324 U. S. 4, 89 L. ed. 656, 65 S. Ct. 505, 57 AM Bankr Rep (N. S.) 689. The rub comes when Congress is silent. Apart from penal enactments, Congress has usually left the limitation of time for commencing actions under national legislation to judicial implications. As to actions at law, the silence of Congress has been interpreted to mean that it is federal policy to adopt the local law of limitation. See *Campbell v. Haverill*, 155 U. S. 610, 39 L. ed. 280, 15 S. Ct. 217; *Chatanooga Foundry & Pipe Works v. Atlanta*, 203 U. S. 390, 51 L. ed. 241, 27 S. Ct. 65; *Rawlings v. Ray*, 312 U. S. 96, 85 L. ed. 605, 61 S. Ct. 473. The implied absorption of State statutes of limitation within the interstices of the federal enactments is a phase of fashioning remedial details where Congress has not spoken but left matters for judicial determination within the general framework of familiar legal principles. See *Jackson County v. United States*, 308 U. S. 343, 349-352, 84 L. ed. 313, 316-318, 60 S. Ct. 285.

“The present case concerns not only a federally created right but a federal right for which the sole remedy is in equity.” *Wheeler v. Greene*, 280 U. S.

*Emphasis here, as well as elsewhere in this brief, is supplied unless otherwise noted.

49, 74 L. ed. 160, 50 S. Ct. 21; Christopher v. Brusselback, 302 U. S. 500, 82 L. ed. 388, 58 S. Ct. 350; Russell v. Todd, 309 U. S. 280, 285, 84 L. ed. 754, 758, 60 S. Ct. 527. And so we have the reverse of the situation in Guaranty Trust Co. v. York, 326 U. S. 99, 89 L. ed. 2079, 65 S. Ct. 1464, 160 A. L. R. 1231, *supra*. We do not have the duty of a federal court, sitting as it were as a court of a State, to approximate as closely as may be State law in order to vindicate without discrimination a right derived solely from a State. We have the duty of federal courts, sitting as national courts throughout the country, to apply their own principles in enforcing an equitable right created by Congress. When Congress leaves to the federal courts the formulation of remedial details, it can hardly expect them to break with historic principles of equity in the enforcement of federally-created equitable rights.

“Traditionally and for good reasons, statutes of limitation are not controlling measures of equitable relief. Such statutes have been drawn upon by equity solely for the light they may shed in determining that which is decisive for the chancellor’s intervention, namely, whether the plaintiff has inexcusably slept on his rights so as to make a decree against the defendant unfair. See Russell v. Todd (*supra*) (309 U. S. at 289, 84 L. ed. 761, 60 S. Ct. 527). ‘There must be conscience, good faith, and reasonable diligence to call into action the powers of the court.’ McKnight v. Taylor, 1 How (U. S. 161, 168, 11 L. ed. 86, 88.) A federal court may not be bound by a State statute of limitation and yet that court may dismiss a suit where the plaintiffs’ ‘lack of diligence is wholly unexcused; and both the nature of the claim and the situation of the parties was such as to call for diligence. . . .’ Benedict v. New York,

250 U. S. 321, 328, 63 L. ed. 1005, 1011, 39 S. Ct. 476. A suit in equity may fail though 'not barred by the act of limitations. . . .' McKnight v. Taylor, *supra*; Alsop v. Riker, 155 U. S. 448, 39 L. ed. 218, 15 S. Ct. 162.

"Equity eschews mechanical rules; it depends on flexibility. Equity has acted on the principle that '*laches* is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties.' Galliher v. Cadwell, 145 U. S. 368, 373, 36 L. ed. 738, 740, 12 S. Ct. 873. See Southern P. Co. v. Bogert, 250 U. S. 483, 488, 489, 63 L. ed. 1099, 1106, 1107, 39 S. Ct. 533. *And so, a suit in equity may lie though a comparable cause of action at law would be barred.* If want of due diligence by the plaintiff may make it unfair to pursue the defendant, fraudulent conduct on the part of the defendant may have prevented the plaintiff from being diligent and may make it unfair to bar appeal to equity because of mere lapse of time."

All of the cases cited by appellant on this point at Appellant's Opening Brief 26-29, *Campbell v. City of Haverhill*, 155 U. S. 610; *Abrams v. San Joaquin Cotton Oil Co.*, 46 Fed. Supp. 969; *Lorenzetti v. American Trust Co.*, 45 Fed. Supp. 128; *Chattanooga Foundry etc. v. Atlanta*, 203 U. S. 390; *Williamson v. Columbia Gas*, 110 F. 2d 15; *Barnes Coal Corp. v. Retail Merchants*, 43 Fed. Supp.

309, are actions for damages and therefore actions solely cognizable at law. Appellant might well have added two recent decisions of this Court, *Suckow v. Borax*, 185 F. 2d 196, and *Burnham v. Borax*, 170 F. 2d 569, to the same effect. However, all of these cases were *actions at law* for the enforcement of federally-created rights. No court has ever made these decisions in cases at law applicable to *actions in equity* for the enforcement of federally-created rights.

(3) The 1948 Amendment to 28 U. S. C., Sec. 1652 Did Not Change the Existing Law.

Anticipating that this Court would treat appellee's claim for reinstatement as a suit in equity (App. Op. Br. 27), appellant attempts to avoid the rule in *Holmberg v. Armbrecht*, *supra*, by seeking to breathe an unintended significance into the 1948 amendment to 28 U. S. C., Sec. 1652, which makes the Federal Rules of Decision Act apply to "civil actions."

However, the reviser's notes quoted by appellant (App. Op. Br. 28) clearly reveal that the amendment was merely intended to state the existing law. "Such act *has* been held to apply to suits in equity."

The past tense thus used by the reviser clearly refers to decisions like *Guaranty Trust Co. v. York* (1945), 326 U. S. 99, which established the definitive rule that independent of the Rules of Decision Act, in diversity cases either in law or in equity, the appropriate state statute of limitations was to be applied. Federal jurisdiction in Sanger's case was derived, however, from an Act of Congress, not diversity of citizenship.

B. Appellee's Claim Was Not Barred by Laches and the Delay in Filing Suit Was Contributed to by Appellant, Who Suffered No Prejudice.

The trial court's finding [XIV, R. 15] that Sanger was not guilty of laches and that the delay in filing suit was contributed to by Plomb, which suffered no prejudice, is amply supported by the evidence (See Statement of Facts, paragraph 12, p. 17, *supra*).

Appellant argues (App. Op. Br. 37) that it suffered prejudice because it had to pay out commissions to other salesmen that it had to hire when it refused to reinstate Sanger. But such losses were solely the product of appellant's stubbornness. Plomb has steadfastly refused to obey the Selective Service Act and (since the decree of reinstatement) the direction of the Court as well. It did this knowing that Sanger at all times was insisting, in a consistent and principled manner, that Plomb respect his rights under the law. Prejudice is the essential ingredient in laches and it is absolutely lacking in this case. Prejudice is, of course, a question of fact upon which the trial court's finding is controlling.

Thus, the Court said in *Watkins Motor Lines, Inc. v. De Galliford* (5 Cir., 1948), 167 P. 2d 274, 275:

“* * * the veteran made every reasonable effort to secure re-employment amicably before filing suit, and should not be charged with undue delay in filing this action. The appellant itself was responsible for much of the delay.”

And, in *Coon v. Liebmann Breweries* (D. N. J., 1949), 86 Fed. Supp. 333, 335, the Court said:

“We are willing to concede that a veteran may be guilty of culpable delay tantamount to an abandonment of his rights, but it seems to us that where the charge is made *the burden is upon the employer* to prove the charge by clear and convincing evidence.”

In a recent patent case, *Holland Co. v. American Steel Foundries* (N. D. Ill., 1950), 95 Fed. Supp. 273, 275, the Court said:

“Further, I find that there is no merit to defendant’s alleged defense of laches. There is ample evidence that plaintiff was in frequent communication with defendant concerning the asserted infringement from 1944—the year defendant made public its devices—until the present action was commenced in 1949. It seems clear that, during this entire period, plaintiff was *honestly endeavoring to effect an amicable settlement of the dispute and avoid litigation*. Certainly, such activity is not incompatible with proper diligence to protect one’s patent interests.”

The three cases in which appellant claims the veteran was penalized for laches (App. Op. Br. 33) are easily distinguished from the case at bar. In *Cummings v. Hubbell*, 76 Fed. Supp. 453, the veteran did not apply for reinstatement and was held to have waived his rights. In *Caldwell v. Harmon*, 12 Labor Cases 63,671, the veteran was a temporary employee who applied too late and changed circumstances were found to exist. In *Daniels v. Barfield*, 77 Fed. Supp. 283, the veteran had been discharged for cause.

(1) **The Act Itself Encourages Delay for Negotiations and Such Delays Are Therefore Not Unreasonable.**

The prelitigation routines suggested by the Selective Service Act take time. They imply recognition of the desirability of direct and indirect attempts to avoid litigation, to procure a durable continuance of the employment relation. (See subsection "e" of 50 U. S. C. App. 308.) Thus in Congressional debate, for instance, Congressman O'Toole (86 Congressional Record, p. 10445) said that if reemployment lasted six months, it would probably last indefinitely.

Congress strongly favors settlement rather than litigation. Thus the law now contemplates this procedure: An approach to the Bureau of Veterans' Reemployment Rights, which implies investigation, advice, negotiation and procuring opinions from the Secretary of Labor, *plus* a reference to the United States Attorney who also investigates and is legislatively encouraged to confer and negotiate, seeking settlement, before making the decision whether to litigate.

The Handbook of the Veterans' Assistance Program of the Selective Service System contains the following instructions:

"203.23. Court Action Procedure. * * *

(b) When assistance in obtaining reinstatement in a former position with a private employer has been sought from the Selective Service System by a veteran, *every possible effort to effect a mutually satisfactory settlement of the veterans' reemployment claim shall be exhausted before resort to court action is had.*"

(2) There Being No State Cause of Action for Reinstatement Against a Private Employer, Only Federal Equitable Principles of Laches Apply and No State Limitations Can Be Taken Into Consideration.

When courts apply the doctrine of laches to federally-created rights, equitable principles are the only proper considerations. The obligation of the courts is to prevent the use of state statutes of limitations as a “mechanical rule” to produce an inequitable result. (*Holmberg v. Armbrecht*, 327 U. S. 392, *supra*.) Only the traditional emphases of federal equity decisions are to be applied. State decisions on laches are not controlling in dealing with a federal right. Thus, even in dealing with state-created rights in *Guaranty Trust Co. v. York*, 326 U. S. 99, *supra*, Mr. Justice Rutledge in his dissenting opinion assumed the inapplicability of state decisions in saying:

“The next step may well be to say that in applying the doctrine of laches a federal court must surrender its own judgment and attempt to find out what a state court sitting a block away would do with that notoriously amorphous doctrine.”

In *Russell v. Todd* (1940), 309 U. S. 280, cited by appellant (App. Op. Br. 34), a bill in equity sought to enforce the liability of shareholders of a joint stock land bank. Under the statute, there was an equal and ratable liability for its debts. The court decided that the remedy for this case was exclusively in equity. Two state statutes existed. Under the first, the action was barred; under the second, which might have included

equitable proceedings, it was not barred. The lower court found that no laches existed, unless inferable from the first of the state statutes of limitations. The Supreme Court decided that in suits exclusively of equitable cognizance in the federal courts, the court without reference to the Rules of Decision Act will follow a state statute covering like causes. However, it will not adopt or apply as a substitute for or a supplement to its own doctrine of laches a state statute of limitations unless that statute applies to *like* causes of action in the state courts, *i. e.*, exclusively equitable causes of action. Since the first statute did not so apply and no other laches was found, the action could be maintained. The Court said:

“But where the equity jurisdiction is exclusive and is not exercised in aid or support of a legal right, state statutes of limitations barring actions at law are inapplicable, and in the absence of any state statute barring the equitable remedy in like cases, the federal court is remitted to and applies the doctrine of laches as controlling.” (P. 289.)

Judge Mathes, in his decision on denying appellant's motion for a summary judgment, pointed out that there was no state statute giving reinstatement rights *against private employers* and that therefore appellant's remedy for claimed delay would be confined to laches as applied by the Federal courts. The appropriate passages of the trial court's opinion follow:

“(3) That while ‘in the absence of a controlling act of Congress federal courts of equity, in enforcing rights arising under statutes of the United States, will . . . adopt and apply local statutes of limita-

tions which are applied to like causes of action by the state courts' (*Russell v. Todd*, 309 U. S. 280, 293 (1940); 28 U. S. C., Sec. 1652), there does not appear to be any remedy either equitable or legal, in like cases (*i. e.*, a statutory cause of action in favor of a former employee and against a private employer to compel reinstatement) under state law (*cf.* *Jones v. Board of Police Commissioners*, 141 Cal. 96, 74 Pac. 696 (1903); *Harby v. Board of Education*, 2 Cal. App. 418, 83 Pac. 1081 (1905);

"(4) That 'in the absence of any state statute barring the equitable remedy in like cases, the federal court . . . applies the doctrine of laches' (*Russell v. Todd, supra*, 309 U. S. at 289; *cf. Guaranty Trust Co. v. York*, 326 U. S. 99 (1945); and

"(5) That there are genuine issues as to certain material facts, including issues (a) as to whether or not plaintiff's delay in the commencement of this action was an unexcused delay, and if so (b) as to whether or not, if the suit is entertained, defendant will suffer prejudice by reason of the delay (see *Flynn v. Ward Leonard Electric Co., supra*, 84 F. Supp. 399, 401-402; *Cummings v. Hubbell*, 7 F. R. D. 360, 362 (W. D. Pa., 1947);

"IT IS NOW ORDERED that defendant's motion for summary judgment, filed February 9, 1950, be and is hereby denied."

C. The Finding That Appellee Left a Position in the Employ of the Appellant Was Abundantly Supported by the Evidence and Was Required by a Construction of the Act to Effectuate Its Remedial Purpose.

(1) The Act Was Never Intended Only to Protect Veterans on Regular Payrolls.

The trial court decided that Sanger, at the time he entered the service, held "a position in the employ" of the defendant within the meaning of the Selective Service Act of 1940 [R. 221]. Referring to the words of the statute "position in the employ of any employer," the trial court said:

"That is a phrase of indefinite content, but I am of the opinion that it is broad enough to cover the plaintiff, and so hold."

In *Kay v. General Cable Corporation* (3 Cir. 1944), 144 F. 2d 653, 654, the Court said:

"The question here presented, therefore, is not to be solved by the application of abstract tests or formulae; but the factors which usually determine the nature of a disputed relationship must be considered *in the light of the purpose which Congress intended to accomplish.*"

Following that decision, this Court in *Brown v. Luster* (9 Cir., 1947), 165 F. 2d 181, 184, said:

"This was carefully noted in the case of *Kay v. General Cable Corporation*, 3 Cir., 144 F. (2d) 653, 654: 'The status which the Statute protects is "a position * * * in the employ of" an employer—an expression evidently chosen with care. The word "employee" was not used. While it may be assumed that the expression which was adopted is roughly

synonymous with “employee,” it unmistakably includes employees in superior positions and those whose services involve special skills, as well as ordinary laborers and mechanics. *Of course, the words are not applicable to independent contractors*, but, except for casual or temporary workers, who are expressly excluded, they cover almost every other kind of relationship in which one person renders regular and continuing service to another.’” (Emphasis supplied by the Court.)

Congress passed the Selective Service Act under its war power and under this power it imposed a new and special obligation upon all employers, as was pointed out by Judge Albert Lee Stephens in *Bochterle v. Albert Robbins, Inc.* (3 Cir., 1947), 165 F. 2d 942, 943.

(2) The “Mischief-remedy” Rule Should Be Applied to Construction of the Selective Service Act.

“In many cases, most of which have been decided since *N. L. R. B. v. Hearst* (1944), 322 U. S. 111, courts have held that traditional common law tests or concepts of an employer-employee relationship . . . are not controlling in dealing with social legislation, and that under such legislation the area between employee and entrepreneurial enterprise is to be surveyed and determined in practical industrial and economic perspective and *with regard for the special remedial purpose of the legislation.*” (*Walling v. McKay* (D. Neb., 1946), 70 Fed. Supp. 160, 170.)

In the *Hearst* case, Mr. Justice Rutledge noted the fact that

“myriad forms of service relationships, with infinite and subtle variations in the terms of employment, blanket the nation’s economy.” (P. 126.)

In that case Mr. Justice Rutledge applied the test which has subsequently become known as the “mischief-remedy test.” (See 32 Cal. Law Rev. 293, 15 Univ. of Chicago Law Rev. 647.)

Referring to the Wagner Act, Mr. Justice Rutledge said in the *Hearst* case:

“The mischief at which the act is aimed and the remedies it offers are not confined exclusively to ‘employees’ within the traditional legal distinctions separating them from ‘independent contractors.’” (P. 126.)

Congress has made the task of the courts in construing the Selective Service Act much easier than it did in the case of the Wagner Act, Social Security Act or the Fair Labor Standards Act. Here, in providing a remedy for the returning veteran, the Court is not required to determine whether or not he was an “employee.” Rather, the Court is merely required to determine whether the veteran “left . . . a position, other than a temporary position, in the employ of any employer.” The “mischief” at which the Selective Service Act was aimed was to assure the person leaving for war that his position was to be kept open for him upon his return. Congress did not confine its assurance to those veterans who happened to be on regular payrolls, drawing daily, weekly or monthly wages. Congress recognized that it was as important to guarantee the postwar security of a veteran, no matter where he fitted into the “myriad forms of service relationships.” It recognized, as Mr. Justice Rutledge said in the *Hearst* case, that “economic relationships cannot be fitted neatly into the containers designated ‘employer’ and ‘employee’ which an earlier law had shaped for different purposes” (p. 128).

Consequently Congress in drafting the Selective Service Act deliberately declined to use the word "employee" and instead chose the word "position."

As a consequence of this wise selection of language, the courts have repeatedly extended the relief of the Selective Service Act to veterans who left positions where they were not employees in the old common law sense of the term.

- King v. Southwestern Greyhound* (10 Cir. 1948), 169 F. 2d 497; cert. den. 345 U. S. 891;
- Loeb v. Kivo* (2 Cir. 1948), 169 F. 2d 346; cert. den. 345 U. S. 891;
- Schwetzler v. Midwest Dairy Products Corp.* (7 Cir. 1949), 172 F. 2d 612;
- Levine v. Berman* (7 Cir. 1947), 161 F. 2d 386; cert. den. 332 U. S. 792;
- Allyn v. Abad* (3 Cir. 1948), 167 F. 2d 901;
- Lee v. Remington Rand* (S. D. Cal. 1946), 68 F. Supp. 837;
- Salter v. Becker Roofing Co.* (M. D. Ala. 1946), 65 Fed. Supp. 633;
- Martin v. Doan* (D. Mass. 1947), 68 Fed. Supp. 783;
- Whitver v. Aalfs-Baker Mfg. Co.* (N. D. Iowa 1946), 67 Fed. Supp. 524;
- Trusteed Funds, Inc. v. Dacey* (1 Cir. 1947), 160 F. 2d 413;
- MacMillan v. Montecito Country Club* (S. D. Calif. 1946), 65 Fed. Supp. 240;
- Dodds v. Williams* (9 Cir. 1947), 163 F. 2d 724;
- O'Connor v. Yardley* (E. D. Pa. 1947), 16 C. C. H. Labor Cases 74,858, aff'd. 3 Cir. 1948, 171 F. 2d 40.

(3) The Finding That Sanger Was Not an Independent Contractor Was Abundantly Supported by the Evidence and Should Be Upheld Under 52 A. of F. R. C. P.

Appellant attempts to disqualify Sanger from the protection of the Selective Service Act by classifying him as an independent contractor. On this point, appellant cites three cases. Two of them, *Rosenbaum v. Ceco Steel Products* (D. D. C. 1947), 84 Fed. Supp. 954, and *Frank v. Tru-Vue, Inc.* (S. D. Ill. 1946), 65 Fed. Supp. 220, are distinguished by the appellant's brief itself since at pages 51, 52, Appellant's Opening Brief, appellant points out that in these two particular cases the position formerly held by the veteran was no longer in existence when he applied for reinstatement. In the third case, *Brown v. Luster* (9 Cir. 1947), 165 F. 2d 81, the trial court had found upon the particular facts before it that the veteran was an independent contractor. This Court merely held that *that* judgment was based on and supported by competent evidence and was not contrary to law, just as it did in *Dodds v. Williams*, 165 F. 2d 724, when it upheld a District Court finding that the veteran was not an independent contractor. In the *Dodds* case, this Court cited with approval the *MacMillan* and *Lee v. Remington Rand* decisions, *supra*.

As the Court said in *Allyn v. Abad*, *supra*:

"On the basis of the printed record, we are inclined to believe that the weight of evidence may have warranted a contrary finding. We are aware, however, that the trial judge had the opportunity to observe the witnesses and evaluate their credibility, and in *Van Doren v. Van Doren Laundry Service*, 3 Cir. 1947, 162 F. 2d 1007, at page 1009, we said, 'There being substantial evidence to support the trial

court's finding on a closely contested question of fact, we are not disposed to weigh the evidence anew.' ”

See Rule 52A of Federal Rules Civil Procedure.

Appellee submits that there was abundant evidence in this case to support the trial court's conclusion [I. R. 17] that Sanger left a position in the employ of the defendant and was not an independent contractor (see pars. 1, 2, 3 and 4 of appellee's statement of the case, p. 2, this brief).

When Sanger went to war, Plomb paid him honor for his patriotism (par. 6, appellee's statement of the case, p. 7, this brief). Similar treatment of another veteran led District Judge Harrison, in *Lee v. Remington Rand, supra*, to make the following observation at page 839:

“As a display of patriotism of its organization, respondent had the name of petitioner displayed, along with other employees, on an honor roll in its Los Angeles branch office. This honor roll designated the petitioner as an ‘employee.’ This discloses his status as considered by respondent while waving the flag.

Unfortunately, respondent failed to exemplify the same degree of patriotism as its employees, and now refuses to restore petitioner to his former position or status with the respondent and is seeking to avoid doing so on strictly technical grounds. Patriotism of the employees was deemed commendable and subject to laudation by the respondent but hollow in its meaning insofar as the respondent was concerned.”

In the *King v. Southwestern Greyhound* case, *supra*, the Court said at page 499:

“The contract specifically provided that the appellant was an independent contractor whose activities were limited to the consummation of the contemplated results, *but it is the effect of the contract* of the parties that controls their relationship, *not what they choose to call themselves.*”

King leased a bus station from the appellee bus lines. Under his contract he was required to pay all utility bills, provide waiting rooms, assume legal liability for claims arising from failure to maintain such facilities, and to be responsible and liable for all acts of his employees. He was compensated by a 10% commission on tickets and express services sold by him. King, like Sanger, had employees of his own, who assisted him in carrying out his duties for the bus line. However, the Court of Appeals for the Tenth Circuit had no difficulty in finding him not to be an independent contractor.

D. There Was No Change in Appellant's Circumstances and No Offer Was Ever Made Appellee of a Position of Like Seniority, Status and Pay.

Appellant would disqualify Sanger from the benefits of the Selective Service Act by arguing that its circumstances had so changed as to make it impossible or unreasonable to require it to reinstate a veteran. All of the force of appellant's argument on this score (App. Op. Br. 51-64) evaporates when it appears from the facts (pars. 5 and 10-B, appellee's statement of the case, p. 13, this brief) that appellant did not find it “impossible or unreasonable” to maintain the stay-at-home sales-

man, Schrenker, until January 1, 1947, on the identical basis on which Schrenker and Sanger were employed before Sanger went into the service.

The appellant concedes (App. Op. Br. 20) that the returning veteran is guaranteed the rights “enjoyed by contemporary employees who had attained at least equal seniority.”

The trial court reached the conclusion [III. R. 18] that the defendant wrongfully refused to offer to restore plaintiff to a position of like seniority, status and pay, equivalent to that left by plaintiff to enter the naval service. The facts supporting this conclusion are abundant (see par. 10, appellee’s statement of the case, p. 11, this brief).

Sanger denied that any offer had been made him of an alternative territory in Chicago [R. 215] and it was conceded that the Kansas City territory claimed to have been offered him had been “whittled off” (App. Op. Br. 71).

Appellant chooses to sneer (App. Op. Br. 59) at Sanger’s good faith “in stating that he wanted at least a year in which to give up his other lines.” Appellee submits that Sanger, throughout, took a principled position and that it is certainly not a lack of good faith for a veteran to want to rely upon the promise of reinstatement that Congress gave him, to want to be treated the same as Schrenker, the stay-at-home veteran, and to be loyal to those other manufacturers who had paid him commissions during the war when Plomb had not.

(1) Plomb's Post-war Profits Were Not a Lawful "Change of Circumstance."

While it is probably true that Plomb did not need a salesman of Sanger's caliber during the lush post-war year of 1946, that is not the kind of changed circumstance which Congress had in mind.

In *Levine v. Berman* (C. A. 7), 161 F. 2d 386, cert. den. 332 U. S. 792, Justice Minton said at page 388:

"No change of conditions had made this unreasonable or impossible. While the petitioner was in service doing his bit to win the war, the respondent's business had prospered so greatly that it could not supply all the rugs it received orders for. When the petitioner returned from service with an honorable discharge and his service, with that of other men, had won a war that made it possible for the respondent to prosper so abundantly, we do not see on this record how it would have been unreasonable or impossible for the respondent to restore the petitioner at his old commission. That is what he was receiving when he left. Some of the respondent's salesmen were receiving the same commission when he returned and applied to be restored and for some time thereafter. *The record does not reveal what the petitioner might have earned if allowed his old territory with his allotment at his old commission of ten per cent.* We cannot therefore say that it would be unreasonable, and certainly not impossible, to restore the petitioner to his territory under allotment at his old commission. *We cannot say it is unreasonable unless we are to say that the returning servicemen shall not share in the abundant prosperity when he returns.* We are not prepared to go that far. Indeed, the tenor and purpose of the Act guide us in a different direction."

An additional citation on this point is *Loeb v. Kivo* (2d Cir.), 169 F. 2d 346, cert. den. 345 U. S. 891.

Loeb was a commission salesman who was informed upon his return from the war that in his absence a buyer's market had been converted into a seller's market and that salesmen were no longer necessary. The Court said, at page 349:

"An increase in business with the resultant change in method of sales as here took place offers no justification, we believe, for defendant's action. * * * To an outsider the conditions of the business would appear the same except for the obvious advantages resulting from wartime prosperity and the universal experience of the need to turn away, rather than to solicit, business during this period. This situation would seem peculiarly the case for the application of the remedial functions of the act. The findings show that this is not the case of requiring the creation of a useless position for the veteran but the granting of some equality of treatment with the stay-at-home employee who had originally been his junior."

The plaintiff in the *Loeb* case was awarded damages measured by what had been earned by the salesman who replaced him, less whatever he earned on his own during that time, the Court saying, at page 351:

"The fact that plaintiff's 1946 earnings thus became greatly increased over his 1942 earnings does not matter, since he was entitled to share in the war-fostered prosperity of the firm."

(2) The Offer of a Changed Territory Was Not Comparable to Sanger's Pre-war Territory.

In *Schwetzler v. Midwest Dairy Products Corp.* (7 Cir. 1949), 174 F. 2d 612, 613, the Court said:

"In *Levine v. Berman*, 7 Cir., 161 F. 2d 386, we held that the returning veteran was entitled to restoration of his original position because he had had an *exclusive territory* and that the position offered in its place did not offer comparable opportunities. To the same effect is *Loeb v. Kivo*, 2 Cir., 169 F. 2d 346. See also *Allyn v. Abad*, 3 Cir., 157 F. 2d 901. Cf. *Salter v. Becker Roofing Co.*, D. C., 65 F. Supp. 633, where the court held that a branch manager was entitled to restoration to the same branch rather than a new one in a different city which would have involved his moving his home and opening up an entirely new territory; and *Whitver v. Aalfs-Baker Mfg. Co.*, D. C. 67 F. Supp. 524, where the court held that a salesman was entitled to restoration of his *original territory which he had himself built up* when the territory offered in its place and rejected by him was greatly inferior in opportunities for earnings."

Mr. Justice Minton in *Levine v. Berman* (7 Cir. 1947), 161 F. 2d 386, 388, said:

"The petitioner had worked in his old territory in less lush days. Presumably he had friends and customers in his territory, and he was entitled to the benefit of his acquaintance and knowledge of this territory. When he returned he found other salesmen in his territory. *There is no showing that it was impossible or unreasonable to remove one or all of these salesmen from the petitioner's old territory, and to restore the territory to him.*"

Appellant's argument here was presented by another litigant in *Mihelich v. F. W. Woolworth Co.* (D. C. D. Idaho, N. D. 1946), 69 Fed. Supp. 497, 498, 499, and the Court had this to say:

"There is evidence, and the defendant has set forth as its reason for denying this petitioner his old position, that they have moved their store from one location to another in the same city and that the old store is not in existence, where this petitioner worked; *that the new store is physically larger in size than the old one, requires more help, handles a greater quantity of merchandise and does more business.*

"I might use the term 'what irony'—*no man would be able to go back to his job on returning from service if this was a defense.* It may be possible to read this defense into the law—that the employer's circumstances are so changed as to make it unreasonable to employ this petitioner, but this Court will not so interpret it under the facts in this case. What caused this defendant to move into larger quarters; what caused it to increase and enlarge its stock? No one will dispute that it was caused by the war which this petitioner was helping to win—and the Court is of the opinion that it didn't grow to such an extent that this petitioner could not successfully manage it, because the manager who was here taking this man's place while he was in the armed forces simply walked over to the new store and continued as manager of the new and enlarged store. Were it not for this man and others like him this business might not have had the opportunity to grow. This store might have been reduced by bombs to a mass of rubble. This might be stretching our imagination, but the situation was such that this man and millions of others like him were called to the Service to help

protect our country; to protect you and me and the man who replaced him as manager while we were all safely at home.

“While this store was adding more and more to its profits, this petitioner, who, it is admitted, has served the defendant faithfully and well for years, was reduced to the rank and to the salary of an ordinary soldier. He didn’t go in as an officer, but as a private in the ranks. It wasn’t a question of salary with him—it wasn’t a question of profits—he offered his life if necessary to protect you and me. When the petitioner left to serve with the armed forces he was commended by his employer, the defendant here. I don’t care to indulge in any patriotic address, I only want to mention a few facts. It has always been the practice in this Country to commend those who left to serve their country in an emergency such as we recently went through; there is always flag waving, cheering, hand shaking, addresses and bands playing. What about the return? That is practically unnoticed. Certainly this petitioner has been penalized severely from a financial standpoint; he not only lost those years when he could have been making money, but he lost his position. He was promised by the Government that this would not happen to him if he survived this conflict.

“The serious question here is whether the defendant met the technical requirement of the Statute. That is, was the petitioner restored to such position, or to a position of like seniority and pay when he was assigned to the store at Astoria. I think ‘not.

“There was a provision in his contract that would indicate that the Company had a right to do this, even though the position was not located in as pleasant surroundings, but I feel that the provisions of

the Selective Service Statute did not contemplate that any clause in a contract of employment would be construed to place the service man in a worse position than he was prior to his induction into the Service, and it would seem that this petitioner was placed in a poorer situation. The evidence is very unsatisfactory in that regard, but at least we have evidence that the petitioner would have made less money at the store at Astoria.”

E. Failure to Restore the Veteran Is a Continuing Violation for Which the Proper Remedy Is Restoration, With Damages Running, Without Limitation, Up to the Time of Restoration.

The judgment in this case falls considerably short of the allowable maximum. The appellee was denied any damages for loss of commissions in the years 1947, 1948, 1949 and 1950. Furthermore, the Court ordered him restored as of 1951 on a reduced territory and at reduced commissions. However, since this action of the Court was probably justified by the Court's equitable discretionary power to control the amount of damages, the appellee filed no cross-appeal.

(1) Right to Compensation Runs From Date of Application for Reemployment.

What the Court did award appellee was incidental damages as well as one year's reinstatement. Appellant concedes that Courts have consistently done this (App. Op. Br. 20, 69), but insists that this Court should have limited the damages to those accruing after September 22, 1949, when the action was filed. Such a contention has been squarely held not to be the law.

In *Coon v. Liebmann Breweries* (D. N. J., 1949), 86 Fed. Supp. 333, 335, the Court said:

“It is the contention of the respondent that the petitioner is not entitled to recover compensation for the loss of wages suffered prior to the institution of this action on September 11, 1947. There are cases which support this contention. *Dacey v. Bethlehem Steel Co.*, D. C., 66 F. Supp. 161, 163; *Thompson v. Chesapeake & Ohio Ry. Co.*, D. C., 76 F. Supp. 304, 308; *Anglin v. Chesapeake & Ohio Ry. Co.*, D. C., 77 F. Supp. 359, 363. These decisions create limitations which are neither prescribed by the Act nor contemplated by its express provisions.

“This Act, like the Selective Training and Service Act, 50 U. S. C. A. Appendix, Sec. 301, *et seq.*, is remedial legislation which must be ‘liberally construed for the benefit of those who left private life to serve their country in its hour of great need.’ See *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U. S. 275, 285, 66 S. Ct. 1105, 1111, 90 L. Ed. 1230, 167 A. L. R. 110. It is our opinion that this rule of construction necessarily prohibits the court’s reading into the Act conditions or limitations which are not therein expressed.”

Other cases holding that compensation for failure to reemploy runs from the date of application for reemployment are:

Allyn v. Abad (Cir. 3, 1948), 167 F. 2d 901;

Anderson v. Schouweiler (D. Idaho, 1945), 63 Fed. Supp. 802;

Van Doren v. Van Doren Laundry (Cir. 3, 1947), 162 F. 2d 1027;

Dacey v. Trusteed Funds, Inc. (D. Mass., 1946), 66 Fed. Supp. 321;

Hayes v. Boston & M. R. Co. (D. Mass., 1946),
66 Fed. Supp. 371;

Bentubo v. Boston & M. R. Co. (D. Mass., 1946),
66 Fed. Supp. 910;

MacMillan v. Montecito Country Club (S. D. Calif.,
1946), 65 Fed. Supp. 240.

Furthermore, District Courts of the United States have initially ordered restoration years after the cause of action arose.

Delaney v. Special Service Co., Inc., 76 Fed. Supp.
414 (E. D. La., 1948) (two years);

Byrd v. North American Aviation, Inc. (S. D.
Calif., 1948, 15 Labor Cases, 73,929) (22
months);

Thompson v. Chesapeake & Ohio Ry. Co., 76 Fed.
Supp. 304 (S. D. W. Va., 1948);

O'Connor v. Yardley Gold Club (E. D. Pa., 1947)
(two years), affirmed a year later, 171 F. 2d 40
(C. A. 3, 1948).

**(2) The Damages Awarded Appellee Fall Far Short of the
Maximum That Could Have Been Awarded.**

In addition, appellant complains about the amount of damages awarded because they were computed on the veteran's old commission basis; on all of his old territory, and without deduction for his earnings from other lines. (App. Op. Br. 68-75.)

But anything short of this allowance would not have constituted the full measure of damages for failure to restore the veteran to a position of "like seniority, status and pay." As previously stated, the judgment actually deprived appellee of a really large sum of money had he

been compensated for all of the time Plomb wrongfully refused to rehire him. In addition the Court required Sanger to credit Plomb with \$34,043.45 to pay the 1946 commissions to the additional salesmen which Plomb had installed in his old territory during the war [R. 16]. The short answer to Plomb's complaint that the Court permitted Sanger to retain his earnings from other lines without deduction (App. Op. Br. 72) is that it is exactly what it was permitting itself in regard to the stay-at-home salesman Schrenker (Par. 10 B, Appellee's Fact Statement, p. 13, this brief).

Section 308(e) of Title 50 App. U. S. C. A. contemplates compensation to the veteran for "any loss of wages or benefits suffered by reason of such employer's unlawful action."

As will hereinafter be shown, District Courts have literally interpreted this section and allowed damages to the veteran from the date of his request for reinstatement to the date of his reemployment, because, until the veteran is reemployed, the employer has continuously acted unlawfully.

It is true that early decisions by some courts assumed a one-year limit on the duration of all statutory rights, because of the limit as to protection against discharge; *Cf. Mihelich v. Woolworth*, 69 Fed. Supp. 497 (D. Idaho, 1946), in which a court questioned the value of ordering restoration 11 months after the employer refused to restore, since it would be for only one month. Some courts concluded that their jurisdiction was taken away one year after the veteran was restored to his position: *Azzerone v. W. B. Coon Co.*, 73 Fed. Supp. 869 (W. D. N. Y., 1947). Today the Supreme Court has decided that the protection of the statutes continues indefinitely, except

as to immunity from discharge without cause. The jurisdiction of the courts continues, subject to Congressional withdrawal. The Supreme Court in *Aeronautical Lodge v. Campbell*, 337 U. S. 521 (1949), ruled that the veteran's rights are continuously affected by the flow of collective bargaining does not discriminate against him as a veteran. The decision in *Oakley v. Louisville & N. R. Co.*, 338 U. S. 278 (1949), rules that along with this, the protection against discrimination continues, to last as long as the employment does. This protection is not confined to any one-year period. There is now, therefore, no justification for limiting damages to a one-year period where they are proved to have outlasted that period.

In the following cases, courts have awarded damages for periods exceeding one year. This includes cases in which damages were cut because of laches:

Parker v. Maynard Boyce (S. D. Cal., 1946), 74 Fed. Supp. 581;

Delaney v. Special Service Co., Inc., 76 Fed. Supp. 414 (E. D. La., 1948) (damages to date of past proper offer of restoration);

Thompson v. Chesapeake & Ohio R. Co., 76 Fed. Supp. 304 (S. D. W. Va., 1948);

Byrd v. North American Aviation, Inc. (S. D. Calif. 1948), 15 Labor Cases, 73,920 (damages until restoration in accordance with court's order, decision two years after violation);

Nobel v. International Nickel Co., Inc., 77 Fed. Supp. 352 (S. D. W. Va., 1948) (same basis as in *Byrd*);

Martin v. John S. Doane Co., 68 Fed. Supp. 783 (D. Mass., 1947) (damages to date of judgment more than year after violation) reversed on other grounds;

and possibly

O'Connor v. Yardley Golf Club., 79 Fed. Supp. 264, affirmed, 171 F. 2d 40 (C. A. 3, 1948), if damages awarded represent fees for two seasons.

In *Sunker v. Local No. 621* (E. D. Tenn., 1949), unreported, the theory was correctly stated. As to an annual elective position the court ordered reinstatement for one year and awarded the one year's damages claimed by the veteran. The court said that a year's wages might there be the nearest equivalent to reemployment but do not suffice where a veteran desires reinstatement, since the assumption that the position would not have lasted beyond a year cannot properly be made.

"Compensation for a veteran's loss of wages for a year is not, in every instance, adequate redress for a deprivation of his rightful job, especially if that also involves deprivation of seniority. In the case of the petitioner, the facts show, and the Court finds, that if he had been restored to his rightful place of employment in good faith on June 3, 1946, he would still be holding that place or a better one now with accumulated standing, tending to forecast continued future employment for an indefinitely long period. He was entitled to all that. To dispose of his complaint with a mere award of lost wages for one year, or some lesser sum, or merely to reinstate him now with no compensation for his admittedly large interim financial loss, would be manifestly inadequate redress for the deliberate wrong done him by the company. The Congress intended that a veteran should be put as nearly as practical in the same position he would have enjoyed if he had not gone to war; and in this case, that purpose cannot be served without reinstatement to proper employment, together with com-

pensation for his interim loss of wages to date. On that basis only, can he be made whole.” (*Byrd v. North American Aviation*, 15 Labor Cases, 73,927.)

There are other decisions in which the reinstatement ordered plus damages covered more than a year (or, after discharge without cause, more than the balance of a one-year period from the initial reemployment). Among these are:

Gockel v. Valley Publishing Co. (S. D. Calif., 1947, unreported);

Grone v. Congregation, 72 Fed. Supp. 544 (W. D. Ky., 1947), reversed on other grounds;

Hoyer v. United Dressed Beef Co., Inc., 67 F. Supp. 730 (S. D. Calif., 1946);

Gawweiler v. Elastic Stop Nut Corp., 69 Fed. Supp. 294, reversed on other grounds;

DiMaggio v. Same, 162 F. 2d 448 (C. A. 3, 1947);

O'Connor v. Yardley Golf Club, 79 Fed. Supp. 264, affirmed, 171 F. 2d 40 (C. A. 3, 1949).

Appellant declares that the trial court was in error in awarding damages for the year 1946, “a period so chronologically separated from the time of reinstatement” that the damages lose their “incidental” character. (App. Op. Br. 68.) No authority is cited by appellant for this proposition.

However, it is apparent that the court selected 1946 because throughout that entire year Plomb continued to

employ Shrenker, the salesman who stayed home, on the pre-war basis that Sanger had; to wit: with permission to augment Plomb income with commissions from other lines. After 1946, this privilege was no longer extended to Shrenker.

Thus when the Court order Sanger reinstated as of 1951, the Court logically confined Sanger's income to the same basis that Shrenker had as of 1951.

But the real damages suffered by Sanger was the loss of 1946, the "cream year" of all. That was the year of Plomb's greatest sales in the Midwest territory. Even though the court may have denied Sanger damages for subsequent years under its equitable power to exercise discretion as to damages (*Bentubo v. Boston & Maine R. R. Co.* (Cir. 1, 1947), 160 F. 2d 326), it could not, in good conscience, and did not, in fact, deny him full recovery for 1946.

On the matter of Shrenker's commissions in 1946, Exhibit 345 [R. 140] states that he was permitted to continue "on the old basis" and it is established that he employed two assistants. However, even if it be conceded, *arguendo*, that his commissions were on a new basis, the court properly awarded the old commission rate to Sanger for 1946 in view of the fact that otherwise the court's decree relieved Plomb of paying Sanger any commissions for the years 1947, 1948, 1949, and 1950.

If it was in the Court's power to award much greater incidental damages, it is hardly for the appellant to complain that the Court granted less.

F. Findings of Fact Should Not Be Set Aside Unless Clearly Erroneous.

This case involved essentially the decision of questions of fact, upon which the trial court made careful and definite findings.

“Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.” (Rule 52(a), F. R. C. P.)

Manual of Federal Appellate Procedure, O'Brien (3rd Ed., San Francisco, 1941), pages 19-20;

Timken v. U. S. (No. 352, Oct. Term, 1950), decided June 4, 1951, 95 L. Ed. Adv. Op. 813, 816;

Grace Bros. v. Commr. (9 Cir. 1949), 173 F. 2d 170, 173, 174.

Conclusion.

This case does not present any new situation. It is just the old story of a veteran being welcomed with legalisms instead of garlands.

The case boils down to the fact that Plomb allowed the recommendations of an outside efficiency expert to outweigh the ordinary humanities that the situation called for. While Sanger was away helping to win the war, he had lost the battle to the efficiency experts out at Plomb. Sanger, who had received nothing from Plomb during the war except favorable notices in the house organ, also received nothing from Plomb after the war.

Fortunately, however, the law supplies a kind of compulsory human decency that always overrules the ef-

iciency experts. Certainly this case is one that called for a truly remedial application of the Selective Service Act. That was what the trial court did.

This is a significant case. We are engaged in another mobilization. Employers may again be writing letters to their government urging that more salesmen be given commissions in the Navy so that they can stop *paying* them commissions themselves. (Salesmen aren't needed in wartime.) This case will indicate whether such salesmen are going to have their welcome by the boss guaranteed on their return or whether they must fear getting the kind of cold, aloof brush-off that Plomb gave Sanger.

In its essence the case is simply this: Is the veteran to be greeted with open arms, or at arm's length? Which is to prevail—the spirit of the Selective Service Act or the recommendations of an efficiency expert?

It is in this Court's power to give the answer. Appellee is confident that it will be the correct one.

The judgment should be affirmed.

Respectfully submitted,

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No. 12873

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE PLOMB TOOL COMPANY, a corporation,

Appellant,

vs.

LIONEL H. SANGER,

Appellee.

BRIEF OF UNITED STATES, AMICUS CURIAE.

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No. 12873

IN THE

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THE PLOMB TOOL COMPANY, a corporation,

Appellant,

vs.

LIONEL H. SANGER,

Appellee.

BRIEF OF UNITED STATES, AMICUS CURIAE.

Introduction.

This brief of the United States as *amicus curiae* is filed because this appeal raises two questions of importance in the performance of the respective duties of the United States Attorneys and the Department of Labor in assisting veterans as provided in Section 8(e) of the Selective Training and Service Act of 1950, 50 U. S. C. App. 308. Argument is confined to those two questions.

Jurisdiction.

Jurisdiction of this court is properly set forth in appellant's opening brief and is not repeated here.

Statement of the Case.

Appellant's and appellee's statements of the case, taken together, are accurate and are not repeated here.

Summary of Argument.

I.

State Statutes of Limitation Do Not Apply to an Action for Reinstatement, With or Without Damages Incidental to Refusal to Reinstatement, Because It Is Exclusively Equitable.

The veteran's right of reinstatement is the principal subject of the Act. Only by placing him in his former position if he desires it can the Act be made effective. Court action to do so necessarily requires the exercise of equitable power to compel affirmative conduct. The action, being exclusively equitable in character, is not governed by State statutes of limitation. (*Holmberg v. Armbrrecht*, 327 U. S. 392.) The Federal Rules of Decision Act does not require the application of such State rules to actions for reemployment.

II.

The Finding of the Trial Court That Laches Does Not Exist in This Case Should Be Sustained.

A. There Was No Delay in 1946.

In the exercise of its equitable discretion, the court below found that laches did not exist, that appellant contributed to the delay and that the delay did not prejudice appellant. These findings are fully supported by the facts in the case, and reasonable inferences from well-known government procedures. Such facts and inferences amply demonstrate that there was no unreasonable delay

in 1946. No damages were awarded for any later period, and appellant cannot have been prejudiced by any delays after 1946. Delay is therefore no bar to the award of damages for 1946.

B. Veterans' Claims Are Not Barred by Laches Where the Delay Is in the Government's Action in Assisting the Veterans.

Delays subsequent to 1946 and through February 1948 were the result of the acts of public officials in assisting the veteran to assert his claim. Such assistance is rendered pursuant to requirements of the Act. Delays occurring therein are not within the control of the veteran, nor very often in the control of the officials themselves. Diligence cannot usually cure such delays, and the veteran is not to be held responsible for them. In this case, the delay resulted first from the public policy requiring United States Attorneys to aid veterans, and second, from changes and developments in the channels through which assistance to veterans was provided. To charge the veteran with such certain and unavoidable delay would deprive him of the very assistance the Act confers. There is no undue burden placed on the employer if such delays are held not culpable, and the veteran's burden would be wholly disproportionate if they were. The lower court was correct in holding laches did not bar the veteran's claim.

ARGUMENT.

I.

State Statutes of Limitation Do Not Apply to an Action for Reinstatement, With or Without Damages Incidental to Refusal to Reinstate, Because It Is Exclusively Equitable.

Basic in the function of this Act is the reinstatement of the veteran in his proper position with his former employer. This function can only be carried out through decrees wholly equitable in nature. *Holmberg v. Armbrecht*, 327 U. S. 392, determined that State statutes of limitation do not apply to such actions.

The principal aim of the law is the protection of the veteran's employment to insure a smooth transition from military to civilian life. So it was considered while under discussion in Congress,¹ and so it has uniformly been interpreted by the courts. Thus, the employment opportunities and privileges afforded the veteran must equal those of employees who progressed through remaining behind. (*Fishgold v. Sullivan Corp.*, 328 U. S. 275 (1946); *Oakley v. L. & N. R. R. Co.*, 338 U. S. 278 (1949); *Droste v. Nash-Kelvinator Corp.*, 64 Fed. Supp. 716 (E. D. Mich. 1946); *Kephart v. United States*, 74 Fed. Supp. 578 (C. Cls. 1947), motion for new trial refused, 75 Fed. Supp. 1020 (C. Cls. 1948).) The Act has a dual purpose, to enable the demobilized veteran to regain his lost skill by its actual use on the job, as well as to provide

¹See comments of two outstanding supporters of the legislation, Representatives Van Zandt and O'Toole, 86 Cong. Rec. 10, 346 and 10,445, respectively.

him a stabilized income during the period of readjustment; thus damages alone are not adequate where reinstatement is desired. (*Dacey v. Bethlehem Steel Co.*, 66 Fed. Supp. 161 (D. Mass. 1946); *Kay v. General Cable Corp.*, 59 Fed. Supp. 358 (D. N. J. 1945); *Hall v. Union Light, Heat & Power Co.*, 33 Fed. Supp. 817 (E. D. Ky. 1944); *Byrd v. North American Aviation, Inc.* (S. D. Calif., 4/23/48, 6/29/48); *King v. Southwestern Greyhound Lines, Inc.* (W. D. Okla. 3/29/48).) As the Court said in *John S. Doane Co. v. Martin*, 164 F. 2d 537, 540 (C. A. 1, 1947): "And the offer of a year's salary without working would not accord to the veteran the opportunity to reacquire skills and business habits which appears to be the purpose of the Act." So paramount is the right of restoration that it has been questioned whether the veteran could maintain an action for damages alone where he was restored belatedly or at too low a rate, or where he desired to retain substitute employment he had found.² The remedial provision itself, Section 8(e) of the Act, is primarily concerned with power of the courts to compel the employer "to comply with such

²*Feore v. North Shore Bus Co., Inc.*, 68 Fed. Supp. 1014 (E. D. N. Y., 1946), reversed on other grounds, 161 F. 2d 552 (C. A. 2, 1947); *Hall v. Union Light, Heat & Power Co.*, 54 Fed. Supp. 817 (E. D. Ky., 1944); *Kent v. Todd Houston Shipbuilding Corp.*, 72 Fed. Supp. 506 (S. D. Texas, 1947); *Kincinski v. Constable Hook Shipyard, Inc.*, 1 Na. Ca. 63707 (D. N. J., 2/26/47); reversed on other grounds 168 F. 2d 404 (C. A. 3, 1948); *Guinther v. Scala*, 11 Na. Ca. 63380 (D. N. J., 9/18/46); *Shine v. Air Associates, Inc.* (D. N. J., 4/10/47); *Miller v. Combustion Engineering Co., Inc.*, 73 Fed. Supp. 359 (E. D. Tenn., 2/1/47), affirmed 165 F. 2d 372 (C. A. 6, 1948).

provisions,” and speaks of damages only “as an incident” of this obligation.³

Only by working in their former positions can veterans have the opportunity to regain and use their previous abilities and experience in a familiar invironment; only thus can they retain their seniority standing, receive the statutory seniority credit for their time in military service, enjoy statutory protection from discharge without cause, and participate in insurance and other benefits in a manner which reflects their pre-war and wartime continuance in the same employment. Here, Sanger could not make use of his long familiarity with and knowledge of appellant’s tools and his conviction that they were good unless he were returned to his position as salesman for appellant. As he said, “I just don’t seem to be able to put up enough sales resistance or to show reason enough why they (his former customers) should discontinue Plomb, because I was sold on Plomb myself and I still think it is the best tool manufactured.” [R. 104.] In addition, it is only in his former sales territory that Sanger can enjoy the benefits of his previous acquaintance and friendship with customers and employ his understanding of their needs and wants. Unless Sanger, or any other veteran, is restored to work in a position in which he retains these advantages, the statutory object is defeated.

³The award of damages as an incident or a part of equitable relief does not, of course, change the character of a proceeding of purely equitable cognizance. Pomeroy, *Equity Jurisprudence*, 5th Ed., Sec. 237e; *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 48, 49 (1936); *Walling v. O’Grady*, 146 F. 2d 422 (C. A. 3, 1944). See also *Feore v. North Shore Bus. Co.*, 161 F. 2d 552 (C. A. 2, 1947).

If the veteran demands reinstatement as he does here, so he can enjoy these advantages, it is obvious that a mere award of damages is insufficient and that an order requiring the employer to meet the statutory obligation to reinstate is necessary. Such order would necessarily specify, with great detail and precision, what affirmative action the employer must take to comply with the Act; it would embrace such matters as the rate of compensation and the method of its computation,⁴ the correction of seniority rosters with dates or roster position set forth,⁵ the place and conditions of employment,⁶ the responsibility and duties to be allocated to the veteran⁷—in fact the scope of orders in reemployment cases is bounded only by the variety of elements in a “position” over which a dispute might arise. The order here was of this kind. It spelled out exactly what Sanger’s territory would be, what his rate of compensation would be and how it would be computed, and what Sanger would have to do in return; it enjoined appellant from discharging Sanger without cause within a year. And to clinch the relief and assure

⁴*Levine v. Berman*, 161 F. 2d 386 (C. A. 7, 1947), cert. den. 332 U. S. 792 (1947); *Whitver v. Aalfs-Baker Mfg. Co.*, 67 Fed. Supp. 524 (N. D. Iowa, 1946).

⁵*Conner v. Pennsylvania R. R. Co.*, 177 F. 2d 854 (C. A., D. C., 1949), cert. den. 339 U. S. 919 (1950); *Chesapeake and Ohio Ry. Co. v. Morris*, 171 F. 2d 579 (C. A. 7, 1948), cert. den. 336 U. S. 967 (1949).

⁶*Loeb v. Kiro*, 169 F. 2d 346 (C. A. 2, 1948); cert. den. 335 U. S. 891 (1948); *Salter v. Becker Roofing Co.*, 65 Fed. Supp. 633 (M. D. Ala., 1946).

⁷*Parker v. Maynard Boyce, Inc.*, 74 Fed. Supp. 581 (S. D. Cal., 1946); *Troy v. Mohawk Shop, Inc.*, 67 Fed. Supp. 721 (M. D. Pa., 1946); *Van Doren v. Van Doren Laundry Service*, 68 Fed. Supp. 938 (D. N. J., 1946), affirmed in part and reversed in part 162 F. 2d 1007 (C. A. 3, 1947).

full compliance, the court retained jurisdiction over the parties. [R. 20, 21.]⁸ Suits in which relief of this type is required are, beyond argument, equitable in nature. (Pomeroy, *Equity Jurisprudence* (5th Ed.), Sec. 138, 170-171.)⁹

Because the veteran's action here is cognizable solely in equity, the Federal Rules of Decision Act, 28 U. S. C., Section 1652, does not require the court to follow state statutes of limitation, and the usual equitable limit of "reasonable time" applies. (*Holmberg v. Armbrecht*, 327 U. S. 392.)¹⁰ In the words of the Supreme Court, the principles are as follows (327 U. S. 395):

"The present case concerns not only a federally created right but a federal right for which the whole

⁸Jurisdiction was retained under this Act in *Hoyer v. United Dressed Beef Co., Inc.*, 67 Fed. Supp. 730 (S. D. Calif., 1946); *Armstrong v. Tennessee Coal, Iron and R. Co.*, 73 Fed. Supp. 329 (N. D. Ala., 1947); *Delaney v. Special Service Co., Inc.*, 76 Fed. Supp. 414 (E. D. La., 1948); *King v. Southwestern Greyhound Lines, Inc.*, unreported (W. D. Okla., 3/29/49), on remand; *Sunker v. Local No. 261*, unreported (E. D. Tenn., 1949).

⁹*Walsh v. Chicago Bridge and Iron Co.*, 90 Fed. Supp. 322 (N. D. Ill., 1949), cited contra by appellant, was an action for damages, and equitable relief was not involved. Even as to damages alone, however, there is some indication that the action in reemployment cases is equitable rather than legal; damages ordinarily are allowable or not according to fixed rules of law rather than the discretion of the court, and the court must follow the proofs, judging credibility as a jury would; yet it has been held that under the Act the award of damages is discretionary with the court, apparently because of its close dependency upon other questions in which discretion must be exercised. *Bentubo v. Boston and Maine R. R.*, 160 F. 2d 326 (C. A. 1, 1947); *Levine v. Berman*, 178 F. 2d 440 (C. A. 7, 1949), cert. den. 339 U. S. 982.

¹⁰Appellant's argument to the contrary seems to be based on the rather serious misconception that the Act provides only a year's employment or a year's wages in lieu thereof (Br. 68). If this were true, appellant perhaps would be correct in its contention that State statutes of limitation apply, since the action could in all cases

remedy is in equity. * * * And so we have the reverse of the situation in *Guaranty Trust Co. v. York*, *supra*. [326 U. S. 99.] We do not have the duty of a federal court, sitting as it were as a court of a State, to approximate as closely as may be State law in order to vindicate without discrimination a right derived solely from a State. We have the duty of federal courts, sitting as national courts throughout the country, to apply their own principles in enforcing an equitable right created by Congress. When Congress leaves to the federal courts the formulation of remedial details, it can hardly expect them to break with historic principles of equity in the enforcement of federally-created equitable rights.

*“Traditionally and for good reasons, statutes of limitation are not controlling measures of equitable relief. Such statutes have been drawn upon by equity solely for the light they may shed in determining that which is decisive for the chancellor’s intervention, namely whether the plaintiff has inexcusably slept on his rights so as to make a decree against the defendant unfair. * * *”*

“Equity eschews mechanical rules; it depends on flexibility. Equity has acted on the principle that

be determined by an award of damages and its character might not be solely equitable. But appellant’s view of the Act is untenable since the decision in *Oakley v. Louisville and N. R. Co.*, 338 U. S. 278 (1949), in which the Supreme Court held the protection of the Act in many respects was not limited to the first year of re-employment, and that the Act did not establish a one-year statute of limitations on veteran’s claims. See also *Sunker v. Local 621* (unreported) (E. D. Tenn., 10/3/49), ordering restoration in addition to interim damages, on the ground that the veteran is entitled to the opportunity of being continued in employment even in an elective position beyond the year in which he may not be discharged without cause; and *O’Connor v. Yardley Golf Club*, 16 Labor Cases Par. 64,892 (E. D. Pa., 1948), *affd.* 171 F. 2d 40 (C. A. 3, 1948), reaching a similar result on an annual contract of employment.

'laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded *upon some change in the condition or relations of the property or the parties.* Galliher v. Caldwell, 145 U. S. 368, 373; see Southern Pacific Co. v. Bogert, 250 U. S. 483, 488-89. *And so a suit in equity may lie though a comparable cause of action at law would be barred.* If want of due diligence by the plaintiff may make it unfair to pursue the defendant, fraudulent conduct on the part of the defendant may have prevented the plaintiff from being diligent and may make it unfair to bar appeal to equity because of mere lapse of time." (Emphasis added.)

Holmberg v. Ambrecht rules this case.¹¹

¹¹Appellant cites the minor change made in 1948 in phraseology of the Rules of Decision Act to show that Act makes State statutes of limitation apply to causes exclusively equitable in nature. The change is irrelevant to this issue. The change was in the provision "The laws of the several States * * * shall be regarded as rules of decision in *trials at common law*, in the courts of the United States, in cases where they apply" (28 U. S. C., Sec. 725); in 1948 "civil actions" was substituted for "trials at common law" (28 U. S. C., Sec. 1652). The phrase defining the cases to which State laws apply is, of course, "cases where they apply" and not "civil actions" or "trials at common law." The change did not affect in any way "the cases where (State laws) apply." As the reporter's note indicated (Title 28, U. S. Code Congressional Service, 80th Cong., 2nd Sess., p. 1868), the change merely conformed the statute to the Federal Rules of Civil Procedure, which established "*one form*" of action. (Rule 2.) The reporter's statement that the Rules of Decision Act "has been held to apply to suits in equity" merely took into account cases like *Cope v. Anderson*, 331 U. S. 461, where the basis of the action, unlike that in *Holmberg v. Ambrecht*, was legal and equity jurisdiction was only concurrent, being based on "the scope of the relief sought and the multitude of parties." (331 U. S. at 463-464.) If, as appellant argues, the new phrase "civil actions" introduced in 1948 made a genuinely substantive change, it is difficult to see how there are now any "cases where (State laws) apply," because the new single form of federal actions was theretofore unknown.

No reason exists here for applying State rules in Federal courts; rather the reverse. Where Federal courts have jurisdiction, either of legal or equitable causes, only by diversity of citizenship and the cause is of State origin, they sit as "only another court of the State" and so should apply the local rules. (*Guaranty Trust Co. v. York*, 326 U. S. 99, 109.) Likewise, in actions basically legal in character, whether legal in form or equitable because of formal considerations such as scope of relief or multiplicity of parties (see *Cope v. Anderson*, note 11 of this brief), State rules properly apply because the court is not called on to exercise discretion or other equitable powers in determining the issue. Neither of these is the case here. The Rules of Decision Act exempts from State rules cases "where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide." By this clause, State laws are inapplicable where they conflict with the policy of a Federal statute. (*Connecticut Mutual Life Ins. Co. v. Schaefer*, 94 U. S. 457 (action on insurance policy under diversity jurisdiction, confidential communication not protected by State statute but not within express exceptions of Federal statute).) And the creation of a special Federal remedy shows a Federal policy as to which State laws cannot control. (*Byron Jackson Co. v. United States*, 35 Fed. Supp. 665 (S. D. Cal. 1940).) This was an action by a vendor against the United States as vendee under the Tucker Act, in which Judge Yankwich held a state policy against liquidated damages inapplicable; the court's holding was (35 Fed. Supp. at 667-668):

"* * * the application of state or federal principles of law to the interpretation of such contracts is dependent upon the source of the rights to be interpreted and the courts in which enforcement is sought.

“Grant that if the Government resorted to a state court to enforce its rights, or was sued therein, its rights might be governed by State rule.

“But when the right to sue the Government on a contract is confined to its own courts, we have clearly a right arising under the laws of the United States, as to which state rules are inapplicable. See *Board of Commissioners v. United States*, 1939, 308 U. S. 343, 349, 350, 60 S. Ct. 285, 84 L. Ed. 313; *Deitrick v. Greaney*, 1940, 309 U. S. 190, 200, 60 S. Ct. 480, 84 L. Ed. 864.”

The nature of the remedy given veterans under the reemployment statutes is unique, and has peculiarly Federal characteristics which eliminate the usual reasons for applying State rules of decision. As has aptly been said, the veteran's action is “*sui generis*.” (*Missouri-K. & T. R. Co. v. Deavers*, 171 F. 2d 961, 962 (C. C. A. 5, 1950).) The need for national uniformity in rights under a law of this type dictates rejection of State statutes of limitation.

The veteran is permitted to sue in Federal courts without costs; he is given a specific right of representation by the United States Attorney in litigation; his case is to be accelerated on the court calendar; the Federal courts are given specific jurisdiction; and the usual jurisdictional amount in diversity cases (the principal category of suit in which State rules apply) is missing. In conferring these special advantages on veterans, Congress emphasized the divorcement of reemployment suits from State law, for Congress lacks power to confer them in State courts. Congress also thereby evinced a unique solicitude for the individual veteran, and indicated a policy of concern for each individual case on its own merits. On this account,

the equitable criterion of "reasonable time" is proper, and not the inflexible rules of statutes of limitation. Such result is but another facet of the "liberal construction" of the Act required by *Fishgold v. Sullivan Corp.*, 328 U. S. 275, 285.

II.

The Finding of the Trial Court That Laches Does Not Exist in This Case Should Be Sustained.

Whether *laches* exists and, if so, to what extent it should bar the relief sought, depends upon the discretion of the court of equity. In the exercise of such discretion, the court below found that *laches* did not exist, that defendant contributed to such delay as occurred, and that the delay did not prejudice defendant in any way. These findings should not be disturbed if there are any reasonable grounds for them.

Laches as a doctrine is stated, somewhat incompletely, in the maxim, "Equity will not aid one who has slept on his rights." There are two reasons for this: First, a court of equity will not adjudicate a case in which a sound determination cannot be made because evidence has been lost by unreasonable delay; and second, a court of equity will not perpetuate an inequity which an unreasonable delay might cause. This latter basis for *laches* does not exist unless the delay, besides being unreasonable, has prevented the other party from taking action by which he could protect his interests, has led him to take action which would make the relief sought burdensome or oppressive, or has otherwise prejudiced him. (*Russell v.*

Todd, 309 U. S. 280;¹² *Coon v. Liebmann Breweries Inc.*, 86 Fed. Supp. 333 (D. N. J. 1949).) Appellant contends that this is what occurred here.

If the delay was not unreasonable, the question of prejudice by it does not arise. The trial court determined

¹²“From the beginning, equity, in the absence of any statute of limitations made applicable to equity suits, has provided its own rule of limitations through the doctrine of laches, the principle that equity will not aid a plaintiff whose unexcused delay, if the suit were allowed, would be prejudicial to the defendant. *Wagner v. Baird*, 7 How. 243, 258; *Stearns v. Page*, 7 How. 819, 828, 829; *Philippi v. Phillippe*, 115 U. S. 151, 157; *United States v. Beebe*, 127 U. S. 338; *Curtner v. United States*, 149 U. S. 662, 676; *Alsop v. Riker*, 155 U. S. 448, 460; *Abraham v. Ordway*, 158 U. S. 416, 420. In the application of the doctrine of laches it recognized that prejudice may arise from delay alone, so prolonged that in the normal course of events *evidence is lost or obscured*; and the English Court of Chancery early adopted the rule, followed in the federal courts, that suits to assert equitable interests in real estate will, without more, be barred after the lapse of twenty years, when ejectment or the right of entry for the assertion of a comparable legal interest in the land would be barred. *Elmendorf v. Taylor*, 10 Wheat. 152, 173; *Hovenden v. Lord Annesly*, 2 Sch. & Lef. 607. And where resort was had to equity *in aid of a legal right*, equity, following the law, would refuse its aid if the legal right had been barred by the applicable statute of limitations. *Carrol v. Green*, 92 U. S. 509; *Godden v. Kimmell*, 99 U. S. 201, 210; *Wood v. Carpenter*, 101 U. S. 135; *Philippi v. Phillippe*, *supra*; *McDonald v. Thompson*, *supra*; *Pomeroy, Equity Jurisprudence* (4th Ed.), Sec. 1441, and cases cited.

* * * * *

“But federal courts of equity have not always held themselves bound to follow local statutes which in ordinary circumstances they could adopt and apply by analogy. In each case the refusal has been placed upon the ground of special equitable doctrines, *making it inequitable* to apply the statute. Laches may bar equitable remedy before the local statute has run. * * * (Citing cases) * * *. On the other hand, time has been held to be no bar to an equitable suit for a trustee’s accounting * * * (Citing cases) * * *. Federal courts of equity have not considered themselves obligated to apply local statutes of limitations *when they conflict with equitable principles*, as where they apply, irrespective of the plaintiff’s ignorance of his rights because of the fraud or inequitable conduct of the defendant. * * * (Citing cases) * * *.” (Emphasis added.) *Russell v. Todd*, 309 U. S. at 287-288.

that the veteran had not delayed unreasonably in bringing his action following appellant's refusal to restore him to his former position. What is "unreasonable" can only be determined by an exercise of the trial court's discretion after consideration of all of the facts placed in the context of the situation and State statutes of limitation are not necessarily a guide. (*Holmberg v. Armbrecht*, 327 U. S. 392.) Such exercise of discretion here is amply supported by the evidence, and so is beyond the scope of review on appeal.

A. There Was No Unreasonable Delay in 1946.

The evidence shows that in January, 1946, appellant refused to give Sanger his former position which he had requested, and made a counter-offer of two different positions. [Stipulation, Ex. 50, par. 10.] Sanger was not able to agree immediately to the counter-proposals, requested and was given "time to think it over" and it was agreed that he "subsequently might come back with a proposition." [R. 131, 151.] Correspondence ensued on these matters. [R. 64, 65, 66, Exs. 25, 26, 31.] In March, 1946, Sanger met with Kerr, appellant's general sales manager, repeated his desire for his old job and received substantially the same counter-offers. [R. 132.] Sanger stated he would have to seek government assistance in getting his old job if appellant would not grant his request voluntarily. [R. 133.] Kerr told him appellant's president "was still of the same opinion" but that he, Kerr, would let Sanger "hear from him when he got back to California." [R. 66.] Within the month, Sanger consulted Selective Service officials concerning his re-employment rights. [Stipulation, Ex. 50, par. 11.]

From these facts, it is clear that the parties were negotiating up through March, 1946, and that Sanger at that time was led to expect some further word from appellant concerning his reemployment. A delay of several weeks at this point to give appellant time to respond certainly cannot be termed unreasonable, especially as Sanger's reinstatement raised problems of retaining other employees. [R. 129.] In this situation, the employer is entitled under the Act to a reasonable time to reach a decision and to make the personnel adjustments entailed in reinstating a veteran. (*Donaldson v. Tennessee Coal, I. & R. Co.*, 68 Fed. Supp. 681 (N. D. Ala., 1946).) Sanger would have had no claim for damages from such delay had he brought this action at the expiration of such reasonable period, say, in June, 1946. Up to this point, Sanger's delay was entirely reasonable; in fact, it seems somewhat doubtful that he could have sued for reinstatement successfully prior to this time, because his status was still being negotiated and he had not been told his claim was finally rejected, though appellant had reached that decision. [R. 142, 155.] Furthermore, the delay up to this time was occasioned by appellant's own actions, and so bars it from asserting *laches* as a defense for damages for this period. (*Special Service, Inc. v. Delaney*, 172 F. 2d 16 (C. A. 5, 1949); *Hayes v. Boston & Maine R. R.*, 66 Fed. Supp. 371 (D. Mass. 19), affirmed 160 F. 2d 325 (C. A. 1, 19); *Byrd v. North American Aviation Co.*, 15 Labor Cases, par. 64, 614 (S. D. Cal. 1948); *DeGalliford v. Watkins Motor Lines* (unrep., D. Ga. 1947), affirmed 167 F. 2d 274 (C. A. 5, 1948).)

The substance of Sanger's conference with Selective Service officials in March, 1946, does not appear. Nonetheless, it is a reasonable inference that he sought advice

and information concerning his rights under the Act, and what Selective Service might do to help him. A prudent man would ascertain this as background for the expected further negotiations with the employer. It is unlikely that Sanger then asked Selective Service officials to intervene, for he was then expecting further word from appellant.

Next in order of events shown by the record is conferences and correspondence by Selective Service with appellant concerning Sanger's position. This began in August, 1946, and continued through October, 1946. [Stipulation, Ex. 50, par. 13.] At most, this shows inaction for only about two months, June and July, 1946. But the inference can readily be made that this period was consumed in investigation and examination of Sanger's case. Indeed, the inference is so strong as to amount almost to a fact; a much longer period for this activity would have been entirely reasonable, as a brief description of the government's procedure in assisting veterans under the Act will show.

By Section 8(g) of the Act, the Director of Selective Service was required "to render aid in the replacement in their former positions of persons" entitled to the benefits of the Act. This function was transferred to the Secretary of Labor by Public Law 26, 80th Congress, March 31, 1947. This function is one of advice, mediation and a search for amicable adjustment if possible; the primary object of the statute is to place the veteran in his job permanently as a means of reabsorbing him into civilian life. Unadjusted differences with the employer, coercion, litigation, all tend to cause bitterness between the employer and employee which may quickly terminate the relation and defeat the object of the statute.

Even after the case is transferred to the United States Attorney for possible litigation under Section 8(e), the Act requires him to attempt "the amicable adjustment of the claim." In assisting veterans, the first step for Selective Service (or the Department of Labor) is to collect the facts and such evidence as is available to substantiate them; next, an opinion must be formed as to the legal merits and possibilities in the case. In a case like Sanger's where many issues exist and some of them are complex, this obviously takes considerable time if the job is to be done properly. Then, if the case appears valid, representations are made to the employer and negotiations are undertaken. In the course of these, disputes often arise concerning the facts or legal issues, and they must be resolved if possible. Compromises on various points by both parties may be offered, and overall-solutions must sometimes be recommended. The general nature of these proceedings is properly an object of judicial notice.¹³ The inferences drawn therefrom by the trial court in reaching his conclusion that there had been no unreasonable delay were almost inescapable and were well within the historical discretion of courts of equity and trial courts on this subject. This accounts for the period through October, 1946,

¹³*United States v. Certain Lands in Douglas County*, 55 Fed. Supp. 924, 925 (W. D. Wis., 1944); executive creation of Labor Board of Review and appointment of personnel; *Ackman v. North State Contracting Co.*, 110 F. 2d 774, 777 (C. A. 6, 1940); careful choice of Selective Service Board members and their sound and sympathetic judgment in selecting inductees. *U. S. ex rel. Beers v. Selective Training and Service Local Board*, 50 Fed. Supp. 39, 40 (W. D. Wis., 1943).

when Selective Service terminated its intervention as hopeless. [Stipulation, Ex. 50, par. 13.]

Sometime thereafter, apparently shortly, Selective Service informed Sanger of the outcome. [Stipulation, Ex. 50, par. 13.] At this point, the usual procedure is to advise the veteran of his right to representation by the United States Attorney and to request him to indicate whether the file should be forwarded to the United States Attorney or returned to the veteran. In this case, the file was transferred from Los Angeles to the United States Attorney in Chicago [R. 14], a much more convenient forum for the veteran, whose employment was nearby. Section 8(e) of the Act obliges the United States Attorney to represent the veteran only if he is "reasonably satisfied" his claim is valid; it is thus necessary for the United States Attorney to make his own determination as to the evidence and legal issues before bringing suit. It would be most extraordinary that these actions could all have been completed and suit filed within the two months November-December, 1946. Here again, there was no abuse of discretion by the court below in drawing such inferences as led it to conclude there was no unreasonable delay.

Thus is the entire year 1946 accounted, with sufficient evidence not merely to support the trial court's exercise of discretion but to make a finding of unreasonable delay in 1946 amount almost to an abuse of discretion. Appellant claims the delay in bringing action prejudiced it financially, in that the award of damages requires it in effect

to pay two commissions on the 1946 sales in Sanger's old territory; there is no other claim of prejudice.¹⁴ (Br. 37.) Damages were awarded only for the year 1946; later periods were excluded and Sanger does not contest this exclusion. Such delays in bringing action as occurred after 1946 are irrelevant because they could not have prejudiced appellant during 1946. Since there was no unreasonable delay in 1946, the trial court's finding that no *laches* existed here is proper, nay, unavoidable.

B. Veteran's Claims Are Not Barred by Laches Where the Delay Is in the Government's Action in Assisting the Veterans.

Appellant contends that the delays in 1947 and 1948 amounted to *laches* and bar the veteran's claim. It asserts the delays were due to Sanger's lack of interest in reclaiming his position with appellant because his earnings from other sources were high in those years; it concludes that this delay bars the entire action. Appellants cite nothing, and we have been able to find nothing, in the record to sustain the conjectured reason for the delays. The United States Attorney in Chicago returned the file to the veteran in February, 1948, with a refusal to represent him. [R. 14.] Since Selective Service advised the veteran of its failure to amicably adjust his claim sometime during or after October, 1946 [R. 14], the longest

¹⁴Yet appellant urges that Sanger's entire action, including his claim to reinstatement, is barred by laches [R. 11]. In the absence of loss of evidence, not claimed, any delay could not have prejudiced appellant in reinstating Sanger. If an unreasonable delay has occurred, the proper action is to undo the prejudice caused by the delay, *i.e.*, to limit damages to periods outside the delay, rather than to adopt the inequitable penalty of dismissing the entire action. See *Dacey v. Bethlehem Steel Co.*, 66 Fed. Supp. 161 (D. Mass., 1946).

period the United States Attorney could have held the file would be November, 1946, to February, 1948.

Delays resulting from inaction of the government officials in performance of their statutory duty to aid veterans are not the responsibility of the veteran and cannot give rise to laches.¹⁵ *Hayes v. Boston & Maine R. R.*, 66 Fed. Supp. 371 (D. Mass., 1946), affirmed 160 F. 2d 325 (C. A. 1, 19....); *Coon v. Liebmann Breweries, Inc.*, 86 Fed. Supp. 333 (D. N. J., 1949); cf. *Juelich v. Syracuse Baseball Club, Inc.*, 15 Labor Cases No. 64,689 (N. D. N. Y., 1948), where the court excused delay on the ground of the veteran's ignorance of the law and procedure, and excused delays connected with consulting private counsel.¹⁶ Where government action is involved, delays may occur without fault and with due diligence of all concerned, just as they may in court proceedings once the action is begun. In March, 1947, the Selective Service System was terminated, the Office of Selective Service Records was established, and the function of assisting veterans in obtaining reemployment was transferred to the Department of Labor. Public Law 26, 80th Congress, March 31, 1947, 60 Stat. 31. Files of all case then pending with Selective Service were transferred at the same time, and it is possible that Sanger's file was among these. Not until July 30, 1947, were funds appropriated to the Department of Labor for performing this work. Public Law 271, 80th

¹⁵*N. L. R. B. v. Sun-Tent Luebbert Co.*, 151 F. 2d 483, 488 (C. A. 9, 1945); *N. L. R. B. v. Andrew Jergens Co.*, 175 F. 2d 130, 134 (C. A. 9, 1949); *Fleming v. Tidewater Optical Co., Inc.*, 35 Fed. Supp. 1015, 1017 (E. D. Va., 1940).

¹⁶In *Noble v. International Nickel Co.*, 77 Fed. Supp. 352 (S. D. W. Va., 1948), cited by appellant to the contrary, the veteran consulted the wrong government agency and left his case there 20 months without following it up.

Cong. 61 Stat. 610, 617. Following this appropriation, field offices were set up and staffed, and work was begun on the pending cases. They were referred to United States Attorneys as quickly as possible, but in many cases it was necessary to ascertain the veteran's wishes, and examine the file in order to advise the United States Attorney of the Department of Labor's views on the legal aspects of the case. Such advice is nearly always sought by the United States Attorney, and is often essential to him. The United States Attorneys are generally burdened with a wide variety of cases in which government interests are involved, ranging from land condemnation to transportation of stolen autos; the problem of veterans reemployment are complex and the more than 400 cases¹⁷ interpreting the Act require a great deal of study and research; thus it is unavoidable that the United States Attorney should depend to a great extent on the advice of the specialists who administer the law from day-to-day. In this situation, it is apparent that substantial delays in disposing of Sanger's case, either by Selective Service or its successor, or by the United States Attorney were to be expected. It is wholly conjectural that the abandonment of public channels in favor of private counsel would speed up the action; in this case, it did not do so.

Such delays are a necessary concomitant of government participation in proceedings of this kind. Diligence cannot eliminate them. Any delay in the period November 1946-February 1948, when the United States Attorney may have held Sanger's case, was reasonable in light of the above

¹⁷Some 250 of the decisions are digested in the *Interpretative Bulletin and Legal Guide, Veterans' Reemployment Rights*, U. S. Dept. of Labor, January 1948, and Supplement thereto, July, 1948.

events. Delays of approximately the length of this were held no bar to the action in *Coon v. Liebmann Breweries, Inc.*, 86 Fed. Supp. 333 (D. N. J., 1949) and *Byrd v. North American Aviation Co.*, 15 Labor Cases, No. 64,614, 22 (S. D. Cal., 1948).¹⁸

Laches is a defense arising out of personal fault, "lack of reasonable diligence" of a party which makes it inequitable to grant the relief he seeks. (Pomeroy *Equity Jurisprudence* (5th Ed.), par. 419.) It is difficult to see how the veteran's diligence, or lack of it could affect the outcome here. He cannot control the diligence of the public officials concerned, even if their inattention is due to their own personal faults rather than to requirements of other duties, turnover in personnel, and the like. Ordinary rules of agency do not govern the application of equitable defenses, and the essential element of personal fault on the part of the veteran is missing. To charge him with the delays of public officials, almost certain to occur, would make him act at his peril in electing the remedy Congress specifically provided for him. It would force him to surrender, at any uncontrollable interruption

¹⁸Reemployment cases appellant cites on his issue have little resemblance to the present case. In *Cummings v. Hubbell*, 76 Fed. Supp. 453 (W. D. Pa., 1948), the veteran did not request the assistance of government officials. In *Caldwell v. Harman*, 12 Labor Cases Par. 63,671 (S. D. Cal., 1947), the veteran was held not to have complied with statutory requirements in several respects, with delay being found, without discussion, an additional reason for denying relief. In *Daniels v. Barfield*, 77 Fed. Supp. 283 (E. D. Pa., 1948), the veteran did not protest his dismissal and made no demand for reinstatement, and the employer was unaware of the claim.

of the public official's attention to the case, the prestige and advantage of government backing. This result is intolerable under a remedial statute which must be "liberally construed" in the veteran's favor so as to carry out its purpose. (*Fishgold v. Sullivan Corp.*, 328 U. S. 275, 285.) At the very least, this result should not be reached without an affirmative showing, going beyond mere lapse of time, that in fact the delay was culpable.

Refusal to charge the veteran with delays of the government casts no excessive burden on the employer. He cannot claim surprise, for the veteran's application for reinstatement has put him on notice of the claim. He can stop his damages at any time by curing his default and complying with the Act. More important, the burden placed on the veteran by the employer's wrongful act is usually much greater than any burden the employer may bear; the veteran is nearly always wholly dependent on the job, much more so than the employer is dependent on the veteran or his replacement; Sanger's probable income from Plomb, his much smaller income when he was forced to rely on other lines, Plomb's sales figures, all show this. When burdens are considered, the equities all lie with the veteran. And finally, and decisive, Congress in making the facilities and prestige of the government available to the veteran cannot simultaneously have meant to penalize him on account of delays inherent in the form of assistance provided. This would nullify the very effect Congress was trying to achieve.

Conclusion.

The decision of the lower court that State statutes of limitation do not apply and that no laches, unreasonable delay, or prejudice by delay exists should be sustained.

Respectfully submitted,

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No. 12873

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

THE PLOMB TOOL COMPANY, a corporation,

Appellant,

vs.

LIONEL H. SANGER,

Appellee.

APPELLANT'S REPLY BRIEF.

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No. 12873

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE PLOMB TOOL COMPANY, a corporation,

Appellant,

vs.

LIONEL H. SANGER,

Appellee.

APPELLANT'S REPLY BRIEF.

The Facts.

Appellee has not questioned our statement in Appellant's Opening Brief (p. 3) that the facts therein set forth were limited to those contained in the Pre-Trial Stipulation (App. A to Op. Br.), which the District Court found to be true, or which otherwise appeared without controversy. Yet while the statement of facts contained in Appellee's Brief (pp. 2-20) purports to be a complete review of the facts, it is noteworthy that appellee carefully omits reference to almost all the facts contained in the Pre-Trial Stipulation [Ex. 50].

The Relationship Between the Parties.

Without referring at all to Paragraph 6 of the Stipulation (App. A to Op. Br. pp. 2-4) containing the essential facts regarding the relationship of the parties or to the terms of the written contract in effect between them at the time of Sanger's entry into the service [Exs. 15 and

16; Op. Br., Apps. C, D, and E], appellee refers instead to various labels such as “salesman,” “representative,” and “district manager” used in the agreements and in correspondence (App. Br. pp. 3-5). As pointed out in our Opening Brief (pp. 45-50) such labels cannot vary the effect of the essential facts of the relationship which are principally set forth in the stipulation and which appellee chooses to ignore.

Furthermore, appellee points out (p. 4) Mr. Pendleton’s testimony that there was no change in the arrangement from the time Sanger first came with the company until he went into the service, without noting that the essence of that arrangement was at all times as set forth in Paragraph 6 of the stipulation, and without calling attention to Pendleton’s testimony (in answer to the Court’s question just preceding that quoted by appellee) to the effect that Plomb never regarded Mr. Sanger as an employee of the company at any time [R. 166].

Sanger’s Reception by Plomb.

Throughout their brief appellee’s counsel seek to create the impression that Mr. Sanger met with a cold reception from Plomb upon his discharge from service (pp. 8-11) and that Plomb was relying upon legalisms and technicalities (p. 56) in order to avoid taking him back in 1946 when business was good and Plomb “did not need a salesman of Sanger’s caliber” (p. 43). The actual facts are exactly to the contrary. The uncontradicted testimony was that although Plomb believed that Sanger had been an independent contractor and therefore was

not entitled to the benefits of the Selective Service Act,¹ it had a high regard for his ability as a salesman and was anxious to have him back on a full-time basis.

Mr. Kerr testified as follows in response to questions by the Court [R. 152]:

“The Witness: The position we took, your Honor, was that we did not believe that he had any rights under the GI Bill. However, we had a great deal of regard and respect for him, and had we been able to work out some arrangement, would have been glad to have him back in the organization.

The Court: In other words, you made him these offers because you wanted him back, not because you thought he had any legal right to be employed, is that correct?

The Witness: That is correct.

The Court: Did you so state to him in substance and effect?

The Witness: That is correct.”

Mr. Sanger himself admitted that Kerr in January, 1946, “told me that he certainly looked forward to having me with the Plomb Tool Company” [R. 60]. Sanger further testified [R. 217]:

“. . . I was informed by Mr. Kerr that I did not have any rights under Selective Service, but they did want me with them because they respected my sales ability.

The Court: In January?

The Witness: Yes, sir.

¹Plomb was not without experience under the reinstatement provisions of the Act, for while Sanger was the only Plomb sales representative who entered the service (as pointed out in Appellee's Brief, p. 7) there were approximately 300 employees of the company who did so [R. 193-194].

Q. (By Mr. Kenny): When was the first time you were told that? Was that in January? A. The first time was in, I think, the first meeting in December, is the way I recall it, but it was within a week period there.”

In view of the company’s expressed conviction that Sanger had been an independent contractor and had no reinstatement rights under the act, there would have been no reason for it to offer him any position if it had desired to stand upon what it believed to be its legal rights, nor would there have been any reason for the repetition of the offers in Kansas City in March, 1946 [R. 132-133] and again in Atlantic City in December, 1946 [R. 134-135, 179, 180].

Plomb wanted Sanger back on a full-time basis, and that, as Mr. Kerr testified, was the stumbling block [R. 123]. Appellee’s counsel seek to create the impression that other factors prevented the parties from reaching an agreement (App. Br. p. 10). They state (App. Br. p. 9) that subject to his request for time to give the other firms some notice, “Sanger was willing to work for Plomb exclusively and in any territory where the company wanted him to work” [citing R. 105]. In this connection appellee’s counsel not only ignore the stipulated facts which were found by the Court to be true, but they misconstrue the testimony. The contrary fact is shown in Paragraph 11 of the Pre-Trial Stipulation (App. A to Op. Br. p. 6) which reads as follows:

“During the month of January, 1946, plaintiff advised defendant that he was unwilling to sever his connections with other manufacturers and was therefore unwilling to accept either of the positions offered him by defendant.”

And Mr. Sanger's decision in this regard is confirmed by his own letter to Mr. Kerr dated February 10, 1946 [Ex. 31] in which he said:

“My loyalty will not allow me to leave the other firms that I represent, at this time, to go with Plomb exclusively. I am going to give them representation at least until the first of the year.”

Sanger's testimony regarding his willingness to work for Plomb exclusively [R. 105] related to willingness *at the time of trial* and not at the time when the offers were made as appellee's counsel seek to imply. In other words, by the time of the trial Mr. Sanger had reconsidered his 1946 refusal to drop his other lines, and had decided that he would now be willing to work for Plomb exclusively.

As we have shown, Sanger's reception by Plomb was not the “cold, aloof, brush-off” claimed in Appellee's Brief (p. 57). On the contrary, although the company did not believe it owed him a legal duty, it offered him two alternative positions because it wanted him back, and Sanger refused because he was unwilling to become a full-time Plomb employee and relinquish the independent aspects of his prewar relationship with the company which enabled him to handle other lines of merchandise. In short, he was unwilling to return upon any basis other than that of an independent contractor.

Plomb's Offer to Sanger.

Appellee asserts (p. 12) that the offer made to him by Plomb was indefinite with respect to the method of dividing the commissions of the territory between him and the other salesmen who were to assist him. As pointed out in our Opening Brief (p. 63) Mr. Sanger admitted that

Kerr told him "We don't pay direct like we did, that is the one man. It is a split basis and the manager of the zone gets 40 per cent and 60 per cent is divided among the other two men" [R. 216-217]. It is difficult to see how the offer could have been made much more definite in this respect, and in any event Sanger's steadfast refusal to give up his other lines made it unimportant to go further with these details of the offer which he was unwilling to accept on other grounds (see Op. Br. p. 63).

With respect to the company permitting Schrenker to handle other lines during 1946, we have pointed out in our Opening Brief (pp. 55, 64) that the company had granted such permission to Schrenker because he was devoting his full-time efforts to Plomb business, leaving his other lines to his assistants, an arrangement far different than that which Sanger hoped to make.²

The Increase in Business.

Appellee states that there was no substantial post-war growth in volume in his other lines, comparing the \$20,-244.49 derived from his other lines in 1941 and 1942 (*two* years) with \$25,968.69 received by him from the other lines in 1946 (*one* year) (App. Br. p. 16). In fact Sanger's earnings from lines other than Plomb increased from approximately \$10,000 in *each* of the years 1941 and 1942 to nearly \$26,000 in 1946 when Sanger was devoting his full time to these other lines [Ex. Q], representing an increase to about 260 per cent of the 1942 volume (as pointed out in Op. Br. p. 74).

²The record reveals the interesting if not strictly material fact that Schrenker, whom appellee's counsel refer to as a "stay-at-home salesman" (App. Br. pp. 13, 41, 51, 55) had himself served in World War I and had a son in World War II [R. 137].

ARGUMENT.

A. Under the Federal Rules of Decision Act, as Amended in 1948, Appellee's Action Is Barred by the California Statute of Limitations.

Appellee contends that his action is one of exclusively equitable cognizance brought to enforce a federally created right and therefore is not barred by Section 338, subdivision 1, of the California Code of Civil Procedure (App. Br. p. 22 *et seq.*).

Appellee argues that the award of damages in this case is merely ancillary to the equity jurisdiction to compel reinstatement, but he somewhat inconsistently attempts to brush aside the case of *Walsh v. Chicago Bridge and Iron Company* (N. D. Ill., 1949), 90 Fed. Supp. 322 (see Op. Br. p. 25), on the ground that there the equity jurisdiction was not invoked because the veteran sought only damages without reinstatement. If appellee is correct in his contention that the damage award in this case is merely ancillary to the equity jurisdiction (App. Br. p. 23), then the damages sought in the *Walsh* case must have still retained their ancillary equitable character and the *Walsh* case must stand for the proposition that the Rules of Decision Act, as amended in 1948, does, as we contend, require the application of state statutes of limitations to *equity* cases to enforce federally created rights.

On the other hand, if the damage claim in such a veteran's action is not ancillary to the equitable claim for reinstatement, then the *Walsh* case clearly stands for the proposition that the state statute of limitations is applicable at least to the portion of appellee's claim by which he sought and was awarded damages.

Even if the entire action, including the claim to damages as well as the claim to reinstatement, be regarded as one of equitable cognizance, we submit that the only proper construction to be given to the Rules of Decision Act, as amended in 1948, requires application of the state statute of limitations to the entire action.

Prior to 1948 when the Rules of Decision Act made state laws applicable only in "trials at common law" in the federal courts, it was construed to require the application of state statutes of limitations to actions at law to enforce rights created and existing under federal statutes which specified no period of limitation. (*Campbell v. Haverhill* (1895), 155 U. S. 610 (cited in Op. Br. p. 26).) The excellent discussion of the rationale of this rule in the opinion in that case is quoted in the Appendix to this brief.

In 1938 the Supreme Court in *Erie R. R. v. Tompkins*, 304 U. S. 64, decided that state law, unwritten as well as written, must be applied by federal courts in all diversity cases except in matters governed by the federal Constitution or statutes. And a week later in *Ruhlin v. New York Life Insurance Co.*, 304 U. S. 202, the same doctrine was applied to a diversity suit in equity. Following these decisions and *not* on the basis of the Federal Rules of Decision Act, the Supreme Court in *Guaranty Trust Co. v. York* (1945), 326 U. S. 99, held that a federal court must apply the state statute of limitations in a suit for equitable relief where jurisdiction is based solely upon diversity of citizenship.

In 1946, and still prior to the amendment of the Rules of Decision Act, the Supreme Court decided *Holmberg v. Armbrrecht*, 327 U. S. 392, relied on in Appellee's Brief (pp. 25-27), holding that a state statute of limitations was not required to be applied to a suit in the federal court

involving a federally created right for which the sole remedy was in equity. The court made it clear that the rule of *Guaranty Trust Co. v. York, supra*, was limited to diversity cases. This decision was entirely correct in the light of the law as it then stood, for the doctrine of the *Erie R. R.* case had no application to suits involving federally created rights and the Rules of Decision Act at that time made state laws applicable only in “trials at common law.”

In the *Holmberg* case the court made it clear that the rule there announced applied “where Congress has not spoken” (327 U. S. at 395). Subsequent to the decision in the *Holmberg* case, Congress spoke by amending the Rules of Decision Act, effective September 1, 1948, substituting “civil actions” for “trials at common law” (28 U. S. C., Sec. 1652, see Op. Br. pp. 25, 28). As noted in our Opening Brief (p. 28) this change was made in the light of the Federal Rules of Civil Procedure which, in 1938, were made applicable “in all suits of a civil nature whether cognizable as cases at law or in equity” (F. R. C. P., Rule 1), and which provided “there shall be one form of action to be known as ‘civil action’ ” (F. R. C. P., Rule 2).

Appellee argues (App. Br. p. 28) that this amendment did not in any way change the existing law. In view of the union of law and equity in the federal courts and the establishment of one form of action, a “civil action,” we submit that the only logical construction to be given to the amended statute is to require application of state statutes of limitations (in the absence of a limitation period specified by Congress), to all civil actions in the federal courts, whether they would formerly have been classified as legal or equitable, and even though the fed-

eral jurisdiction is based on a federal statute, as in this case.

Appellee would deprive the amendment of any effect whatsoever. In effect he would substitute for the words "civil actions" something like "civil actions in cases where the federal jurisdiction is based solely upon diversity of citizenship" (which would be anomalous in view of the holding in *Guaranty Trust Co. v. York*, 326 U. S. 99, *supra*, that state laws must be applied in diversity cases irrespective of the Rules of Decision Act), or "civil actions, except actions for the enforcement of rights created by federal statute which were enforceable only on the equity side of the federal courts before the union of law and equity." No such violence to the language of Congress can be supported.

An argument similar to that of appellee was rejected in *Ex parte Collett* (1949), 337 U. S. 55, involving 28 U. S. C., Sec. 1404(a), a part of the same revision of the Judicial Code which produced the amendment to the Rules of Decision Act here in question. Section 1404(a) authorizes a federal district court, for the convenience of parties and witnesses in the interest of justice, to transfer "any civil action" to any other district where it might have been brought; and that section was there held applicable to suits under the Federal Employers' Liability Act despite the provision in the latter act permitting a suit to be brought thereunder in any district in which the defendant is doing business. Chief Justice Vinson there said (337 U. S. at 58):

"The court below relied on the language of §1404(a), *supra*, which it regarded as 'unambiguous, direct, clear.' We agree. The reach of 'any civil action' is unmistakable. The phrase is used with-

out qualification, without hint that some should be excluded. From the statutory text alone, it is impossible to read the section as excising this case from 'any civil action.' ”

To the same effect is *Kilpatrick v. Texas & Pacific Railway Co.* (1949), 337 U. S. 75, and in *U. S. v. National City Lines* (1949), 337 U. S. 78, the same code provision for transferring “any civil action” was held applicable to an action by the United States for an injunction and other relief under the Sherman Act, a case clearly involving a purely federal right and traditionally cognizable only in equity.

Congress having subsequently spoken through its amendment of the Rules of Decision Act, the case of *Holmberg v. Armbrecht*, *supra*, is no longer controlling here; and even if this case be considered as one solely cognizable in equity, it is subject to the California statute of limitations embodied in Section 338, Subdivision 1, of Code of Civil Procedure, since Congress has specified no time for bringing suit under the Selective Service Act.

B. Appellee's Claims Are in Any Event Barred by Laches and Delay.

We have already dealt in our Opening Brief (pp. 35-37) with appellee's contentions that Plomb contributed to and was not prejudiced by Sanger's delay in filing suit, and we have cited cases (Op. Br. pp. 30-31) showing that laches are not precluded from attaching either by consultation with the Selective Service System and the United States Attorney or by direct negotiations with the alleged employer. Appellee seeks to distinguish *Cummings v. Hubbell*, 76 Fed. Supp. 453; *Caldwell v. Harman*, 12 C. C. H. Labor Cases, Par. 63,671, and *Daniels v. Bar-*

field, 77 Fed. Supp. 283, cited by us (Op. Br. pp. 33-34), on the ground that other factors existed in each of those cases. It is true that other factors did exist, but a clear alternative ground for the holding in each case was the application of the doctrine of laches.

In seeking to avoid the application of *Russell v. Todd*, 309 U. S. 280 (cited in Op. Br. pp. 34-35), appellee argues that the Federal courts will not apply a state statute of limitations "unless that statute applies to like causes of action in the state courts, *i. e.*, exclusively equitable causes of action," and he takes the same position as that taken by the District Court in its denial of appellant's motion for summary judgment and argues that there is no "like cause of action" in California because there is "no state statute giving reinstatement rights *against private employers*" (App. Br. p. 33).

As pointed out in our Opening Brief (pp. 29-30, 35) there are state statutes giving school teachers and police officers rights to reinstatement in their positions, and actions to enforce those rights have been held subject to the statute of limitations contained in Section 338, Subdivision 1, of the Code of Civil Procedure. (*Jones v. Board of Police Commissioners*, 141 Cal. 96, 74 Pac. 696; *Harby v. Board of Education*, 2 Cal. App. 418, 83 Pac. 1081.) These actions to compel reinstatement in positions with public employers are just as exclusively equitable in nature as is appellee's action for reinstatement under the Selective Service Act. They are identical with appellee's action in their equitable aspects, the only distinction being in the public, rather than private, character of the defendant. This, we submit, is a distinction without a difference.

Wholly aside from the construction placed upon the Rules of Decision Act, this action is barred under the rule of *Russell v. Todd*, *supra*.

C. Appellee Was an Independent Contractor and Therefore Was Not Entitled to the Benefits of the Act.

1. Independent Contractors Are Not Protected by the Selective Training and Service Act.

We have never contended that Sanger was outside the protection of the Act simply because he was paid commissions instead of a salary. Nevertheless the courts have consistently held that independent contractors are excluded from the coverage of the Act.

The so-called "mischief-remedy" rule of *N. L. R. B. v. Hearst Publications* (1944), 322 U. S. 111, which appellee argues should be applied here (App. Br. pp. 36-38), has already been considered by this Court in relation to Social Security Act coverage of independent contractors. In *Henry Broderick, Inc. v. Squire* (9 Cir. 1947), 163 F. 2d 980, this Court reviewed in detail the facts of the relationship in question, reversed the judgment of the district court (59 Fed. Supp. 109) which was based primarily on the *Hearst* case, and held that the relationship was that of independent contractor in the light of the tests laid down in the later case of *U. S. v. Silk* (1947), 331 U. S. 704. The *Broderick* case was later relied upon by this Court in *Brown v. Luster* (1947), 165 F. 2d 181 (Op. Br. pp. 38-44).

At page 38 of his brief appellee cites a number of cases for the proposition that the Selective Service Act has been extended to cover veterans who left positions where

they were not employees in the common law sense of the term. Not one of those thirteen cases holds or even intimates that an independent contractor is subject to the Act. In fact only three involve any question as to whether the veteran was or was not an independent contractor. (*King v. Southwestern Greyhound Lines* (10 Cir. 1948), 169 F. 2d 497; *Lee v. Remington-Rand* (S. D. Cal. 1946), 68 Fed. Supp. 837, and *MacMillan v. Montecito Country Club* (S. D. Cal. 1946), 65 Fed. Supp. 240.)

Not one of the thirteen cases involved a combination of facts such as are involved here, where a sales representative handled other lines of merchandise, paid his own expenses, employed his own assistants, selected his own itineraries and operated with the degree of independence enjoyed by Mr. Sanger. None of them involved facts at all comparable with those of *Brown v. Luster*, 165 F. 2d 181, decided by this Court and analyzed at length in our Opening Brief (pp. 38-44).

2. The Conclusion That Sanger Was Not an Independent Contractor Is Not Supported by the Findings of Fact and Is Contrary to the Uncontroverted Evidence.

Rule 52(a), F. R. C. P., relied on by appellee (App. Br. pp. 39-40), has no application to appellant's contention that Sanger was an independent contractor, for appellant has made no attack upon the *findings* of the District Court in this connection. The District Court *concluded* that Sanger was not an independent contractor [Concl. I, R. 17], and it is that *conclusion* which we earnestly contend is not supported by the findings and is contrary to law. In any event this is not a case where the trial judge's opportunity to observe the witnesses and

evaluate their credibility is important as in *Allyn v. Abad* (3 Cir. 1948), 167 F. 2d 901 (App. Br. p. 39), for the facts upon which we rely in this connection are contained in the Stipulation of Facts or otherwise appear from uncontroverted evidence.

In *Brown v. Luster*, 165 F. 2d 181, the district court had found the facts relating to the relationship between the veteran and his alleged employer and the facts set forth in the left hand column of the comparison of that case with this one in our Opening Brief (pp. 40-43) were taken directly from those findings of the trial court. The trial court there concluded that the veteran was an independent contractor and this Court properly held that the findings were sufficient to support that conclusion. We respectfully submit that the District Court's finding of substantially similar facts in this case cannot support its contrary conclusion that Sanger was *not* an independent contractor and that this Court should reverse the decision in the light of the undisputed facts just as it did in *Henry Broderick, Inc. v. Squire*, 163 F. 2d 980, *supra*.

The cases of *Rosenbaum v. Ceco Steel Products Corp.*, 84 Fed. Supp. 954, and *Frank v. Tru-Vue, Inc.*, 65 Fed. Supp. 220, cited in our Opening Brief (pp. 44, 47, 52), are also directly in point on the independent contractor question despite appellee's attempt to distinguish them (App. Br. p. 39). In each of those cases the court first concluded that the veteran had been an independent contractor and was not entitled to the benefits of the Act and then, as an alternative ground of decision, concluded that even if he had been an employee the defendant's circumstances had in any event so changed as to make reinstatement unreasonable.

D. Appellant's Circumstances Had so Changed as to Make It Unreasonable to Reinstate Appellee in His Exact Pre-War Position and Appellant Offered Him a Position of Like Seniority, Status and Pay.

1. Changed Circumstances.

Appellant has made no claim that its increased post-war business made salesmen unnecessary as was the case in *Loeb v. Kivo* (2 Cir. 1948), 169 F. 2d 346 (App. Br. p. 44), and *Levine v. Berman* (7 Cir. 1947), 161 F. 2d 386 (App. Br. p. 43).

Here the difficulty was not a lack of need for salesmen but rather was Plomb's desire for more of Sanger's time than he was willing to give. The company did not retain Schrenker through 1946 on the identical basis which Sanger enjoyed before the war, as appellee contends (App. Br. pp. 41-42), for Schrenker was devoting his own full time to the sale of appellant's products [R. 136, 140, 171; Op. Br. pp. 55, 64].

2. The Offer of the Kansas City Territory Was Equivalent in Seniority, Status and Pay.

The cases of *Levine v. Berman* (7 Cir. 1947), 161 F. 2d 386, and *Mihelich v. F. W. Woolworth Co.* (D. Ida. 1946), 69 Fed. Supp. 497, cited by appellee (App. Br. pp. 45-48), involved situations where the veteran was offered an entirely different territory requiring him to move and make new contacts. The same was true of *Salter v. Becker Roofing Co.*, 65 Fed. Supp. 633, and *Whitver v. Aalfs-Baker Mfg. Co.*, 67 Fed. Supp. 524, cited in appellee's quotation from *Schwetzler v. Midwest Dairy Products Corp.* (7 Cir. 1949), 174 F. 2d 612 (App. Br. p. 45). Plomb's offer to Sanger was not of this sort, for

he was offered his old Kansas City territory with only a minor reduction in area. The cases cited in appellee's quotation from the *Schwetzler* opinion (App. Br. p. 45) were cited by the court there purely for the purpose of distinguishing them, and the court concluded that the employer in the *Schwetzler* case had discharged its duty when it offered the veteran a route *different* from that which he had previously had but one which afforded comparable opportunities as to seniority, status and pay.

As pointed out in our Opening Brief (pp. 60-62) the offer made to Sanger afforded him opportunities which were not only comparable to those offered by his pre-war arrangement, but which also would have given him an increased share in the post-war prosperity of the company.

E. The Damages Awarded Appellee Are Excessive.

Appellee contends that the "right to compensation runs from date of application for reemployment" (App. Br. p. 48). Basic reliance is placed by appellee upon *Coon v. Liebmann Breweries* (D. N. J., 1949), 86 Fed. Supp. 333 (App. Br. p. 49), in which Judge Smith criticizes several of the cases cited by appellant (Op. Br. p. 67) which hold that where a veteran unreasonably delays in instituting the action, damages are limited to the period subsequent to its filing. But the *Coon* case is the only one of its kind, a definite minority compared to the numerous cases holding the other way. Moreover, in the *Coon* case there was a delay of only one year and three months as compared with the three and one-half year delay in the present case.

Appellee cites seven additional cases as holding "that compensation for failure to reemploy runs from the date of application for reemployment" (App. Br. pp. 49-50). Those cases are completely irrelevant in rebuttal to appellant's proposition that damages should be limited to the period following the commencement of this action on September 22, 1949. In only one of them did the period of delay exceed one year, and in the others the period was only a few months.

Appellee cites four cases in which courts "initially ordered restoration years after the cause of action arose" (App. Br. p. 50). Of these four cases the longest delay between the time the veteran asked reinstatement and the time the action was brought was sixteen months in *Thompson v. Chesapeake & Ohio Ry. Co.* (S. D. W. Va., 1948), 76 Fed. Supp. 304. Significantly that is one of the cases (cited by appellant in Op. Br. p. 67) which hold that damages are limited to the period, after commencement of the action due to the veteran's delay in filing the action, even though a portion of the time was consumed by consulting the United States Attorney who ultimately filed suit and prosecuted the action.

Appellee's replies to the remaining four of appellant's five counts of error with respect to the damages are all lumped together under the heading "The Damages Awarded Appellee Fall Far Short of the Maximum That Could Have Been Awarded" (App. Br. p. 50). He cites six cases (App. Br. p. 52) as having awarded damages for periods exceeding one year. Four of these cases are incorrectly cited and the damages awarded quite clearly did not exceed the period of one year, as follows: *Parker v. Maynard Boyce* (S. D. Cal., 1946), 74 Fed. Supp. 581, five months; *Thompson v. Chesapeake & Ohio R. Co.*

(S. D. W. Va., 1948), 76 Fed. Supp. 304, eleven and one-half months; *Noble v. International Nickel Co., Inc.* (S. D. W. Va., 1948), 77 Fed Supp. 352, two and one-half months; and *Martin v. John S. Doane Co., Inc.* (D. Mass., 1947), 68 Fed. Supp. 783, one year. Thus only two of the six cited decisions actually awarded damages for a period in excess of one year, and in one of those, *Delaney v. Special Service Co.* (E. D. La., 1948), 76 Fed. Supp. 414, damages were awarded for the period of only one year and thirteen days.

Appellee does not comment upon the authorities cited by us in support of our contention that the damages should have been computed on the basis of the $7\frac{1}{2}\%$ commission rate in effect for all salesmen in 1946 and on the basis of the Kansas City territory as it then existed (Op. Br. pp. 69-72). His only answer with respect to the commission rate is his somewhat surreptitious attempt to create doubt that Schrenker's commissions in 1946 were on the basis of $7\frac{1}{2}\%$ which prevailed for all salesmen (App. Br. p. 55). The uncontradicted evidence of Mr. Leach [R. 140] was that the $7\frac{1}{2}\%$ commission rate applied to *all* representatives and was established January 1, 1944.

Nor is there merit in appellee's purported "short answer" to appellant's complaint that Sanger was permitted to retain his earnings from other lines without deduction. This was not "exactly what it was permitting itself in regard to the stay-at-home salesman Schrenker," as appellee contends (App. Br. p. 51), for Mr. Schrenker, as shown by the testimony and as explained (Op. Br. pp. 55, 64), was devoting his full-time efforts to the sale of Plomb tools.

Conclusion

For the reasons set forth herein and in Appellant's Opening Brief we respectfully submit that the judgment should be reversed.

Respectfully submitted,

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APPENDIX.

In *Campbell v. Haverhill* (1895), 155 U. S. 610, the court said at pages 614-615:

“It is insisted, however, that by the express terms of section 721, the laws of the several States should be enforced only ‘in cases where they apply,’ and that they have no application to causes of action created by Congressional legislation and enforceable only in the Federal courts. The argument is, that the law of the forum can only apply to matters within the jurisdiction of the state courts, and that the recognition given by Congress to the laws of the several states does not make such laws applicable to suits over which the state courts have no jurisdiction, because for want of jurisdiction over the subject-matter of the suit, the tribunals of the State are powerless to enforce the state statutes with respect to it; in other words, that the States, having no power to create the right or enforce the remedy, have no power to limit such remedy or to legislate in any manner with respect to the subject-matter. But this is rather to assert a distinction than to point out a difference . . .”

And further, at pages 616-617:

“Recurring then to the main proposition above stated, it may be well questioned whether there is any sound distinction in principle between cases where the jurisdiction is concurrent and those where it is exclusive in the Federal courts. The section itself neither contains nor suggests such a distinction. The language of the section is general

that the laws of the several States shall be regarded as rules of decision in every case to which they apply, and it is at least incumbent upon the plaintiff to show that, for some special reason in the nature of the action itself, the section does not apply. But why should the plaintiff in an action for the infringement of a patent be entitled to a privilege denied to plaintiffs in other actions of tort? If States cannot discriminate against such plaintiffs, why should Congress by its silence be assumed to have discriminated in their favor? Why, too, should the fact that Congress has created the right, limit the defenses to which the defendant would otherwise be entitled? Is it not more reasonable to presume that Congress, in authorizing an action for infringement, intended to subject such action to the general laws of the State applicable to actions of a similar nature? In creating a new right and providing a court for the enforcement of such right, must we not presume that Congress intended that the remedy should be enforced in the manner common to like actions within the same jurisdiction?

“Unless this be the law, we have the anomaly of a distinct class of actions subject to no limitation whatever; a class of privileged plaintiffs, who, in this particular, are outside the pale of the law, and subject to no limitation of time in which they may institute their actions . . . This cannot have been within the contemplation of the legislative power. As was said by Chief Justice Marshall in *Adams v. Woods*, 2 Cranch. 336, 342, of a similar statute: ‘This would be utterly repugnant to the genius of

our laws. In a country within which not even treason can be prosecuted after the lapse of three years, it can scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture.'

"Whatever prejudice there may have been in ancient times against statutes of limitations, it is a cardinal principle of modern law and of this court, that they are to be treated as statutes of repose, and are not to be construed so as to defeat their obvious intent to secure the prompt enforcement of claims during the lives of the witnesses, and when their recollection may be presumed to be still unimpaired"

No. 12873

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE PLOMB TOOL COMPANY, a corporation,

Appellant,

vs.

LIONEL H. SANGER,

Appellee.

APPELLANT'S BRIEF IN ANSWER TO BRIEF
OF UNITED STATES AS AMICUS CURIAE.

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APPELLANT'S BRIEF IN ANSWER TO BRIEF OF UNITED STATES AS AMICUS CURIAE.

Appellant respectfully submits this reply to the brief filed herein by the United States as *amicus curiae*, dealing with the effect of the statute of limitations and the doctrine of laches.

ARGUMENT.

I.

Appellee's Action Is Barred by the California Statute of Limitations Under the Federal Rules of Decision Act, as Amended in 1948.

Amicus curiae's argument against the application of state statutes of limitations to a veteran's action under the Selective Service Act is based upon the premise that an action for reinstatement with or without incidental damages is exclusively equitable in character. *Amicus*

curiae relies entirely upon the decision in *Holmberg v. Armbrrecht* (1946), 327 U. S. 392 (A. C. Br. pp. 2, 4, 8-10), decided in 1946, and relegates to a footnote (A. C. Br. p. 10, note 11) its analysis of what it calls the "minor change" made in the Rules of Decision Act two years later in 1948.

It is clear that reinstatement of the veteran is a remedy which falls within the class of those traditionally given only by courts of equity. It is not so clear that the monetary damages sought by and awarded to appellee constitute an equitable remedy or even an incident to the equitable remedy of reinstatement, in view of the cases cited by *amicus curiae* where veterans have been permitted to recover damages alone without reinstatement (A. C. Br. p. 5, note 2). And in the case of *Walsh v. Chicago Bridge & Iron Company* (N. D. Ill. 1949), 90 Fed. Supp. 322, a veteran's action for damages alone was treated as being legal in nature and was held to be barred by the Illinois statute of limitations (see Op. Br. p. 25; Rep. Br. p. 7).

Nevertheless, assuming for the purposes of argument that the appellee's entire action, including his claims to reinstatement and damages, is one which historically would have been regarded as within the exclusive jurisdiction of equity, the argument of *amicus curiae* will not stand up in the light of the modern union of law and equity and the correlative amendment made in 1948 to the Federal Rules of Decision Act (28 U. S. C., Sec. 1652).

Amicus curiae cites *Holmberg v. Armbrrecht* (1946), 327 U. S. 392, in support of its argument that because this action "is cognizable solely in equity, the Federal

Rules of Decision Act, 28 U. S. C., Section 1652, does not require the court to follow state statutes of limitation” (A. C. Br. p. 8). But *Holmberg v. Armbrecht* did not in any way construe 28 U. S. C., Section 1652, for it was decided two years prior to the revision of the Judicial Code which brought that section into being. The Rules of Decision Act, as it existed at the time of the decision in *Holmberg v. Armbrecht*, was embodied in Revised Statutes, Section 721, 28 U. S. C., Section 725, and it then provided.

“The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision *in trials at common law*, in the courts of the United States, in cases where they apply.”¹

Thus when the Supreme Court decided in *Holmberg v. Armbrecht* that the action there concerned “not only a federally-created right but a federal right for which the sole remedy is in equity,” the case was thereby immediately taken out of any possible sphere of application of the Rules of Decision Act as it then stood, with its express limitation to “trials at common law.” The court then pointed out that the *Holmberg* case, concerning a federally created right, was not one where the court’s jurisdiction was based on diversity of citizenship and where the duty of a federal court was to apply state law as closely as might be under the principle of *Eric R. R. v. Tompkins* (1938), 304 U. S. 64. Being bound neither

¹Emphasis here, as elsewhere in this brief, is supplied unless otherwise noted.

by the Rules of Decision Act nor by the doctrine of the *Erie* case, the court decided that it was not required to apply the state statute of limitations.

Amicus curiae, like appellee, seeks to apply *Holmberg v. Armbrrecht* to this case as the controlling authority, despite the fact that the statutory law on the subject has been changed since the date of that decision. In the light of the Federal Rules of Civil Procedure, providing for one form of action, a "civil action," and applying in all civil suits "whether cognizable as cases at law or in equity" (F. R. C. P. Rules 1 and 2), the Rules of Decision Act was amended effective September 1, 1948, to provide that state laws shall be regarded as "rules of decision in civil actions in the courts of the United States, in cases where they apply" (28 U. S. C., Sec. 1652). If the clear language of the amended statute means what it says, or if, indeed, it means anything at all, then it must lead to the result that *Holmberg v. Armbrrecht* is no longer the law and that, in the absence of a limitation period specified by Congress, state statutes of limitations are now applicable to actions in the federal courts to enforce federally created rights where the suit would historically have been one of purely equitable cognizance, just as they have for many years been applicable to actions at law in the federal courts to enforce federal rights.

Similar language in 28 U. S. C., Section 1404(a) authorizing the federal district courts to apply the doctrine of *forum non conveniens* and to transfer "any civil action" to any other district where it might have been brought, was recently applied by the Supreme Court to an action by the United States for an injunction and other relief under the Sherman Act in *United States v. National*

City Lines (1949), 337 U. S. 78. That action, which was thus held to be within the meaning of the phrase “any civil action,” was clearly one which was traditionally cognizable only in equity and which involved a purely federal right. The decision was based upon the court’s concurrent decision in *Ex parte Collett* (1949), 337 U. S. 55, in which the same *forum non conveniens* statute was applied to a suit under the Federal Employers’ Liability Act and in which Chief Justice Vinson said (337 U. S. at 58):

“The court below relied on the language of §1404 (a), *supra*, which it regarded as ‘unambiguous, direct, clear.’ We agree. The reach of ‘any civil action’ is unmistakable. The phrase is used without qualification, without hint that some should be excluded. From the statutory text alone, it is impossible to read the section as excising this case from ‘any civil action.’ ”

This reasoning applies with equal force to the words “in civil actions in the courts of the United States” as used in the Rules of Decision Act, as amended.

Amicus curiae’s argument as to the construction of the amended statute (A. C. Br. p. 10, note 11) is one which we must confess we are completely unable to follow. *Amicus curiae’s* statement that the cases to which state laws apply under the statute are defined by the phrase “cases where they apply” seems to us to be a masterpiece of circular reasoning. Clearly, the phrase “in cases where they apply,” as related to our case, must mean that where a state statute of limitations applies to similar suits in equity in the state courts, it must now be applied to such a suit in equity in the federal courts in the absence of an applicable federal period of limitations.

The argument of *amicus curiae* to the contrary ignores the many decisions in which actions at law in the federal courts for the enforcement of federally created rights have been held to be cases to which state statutes of limitations applied under the Rules of Decision Act prior to its 1948 amendment.²

And *amicus curiae's* argument was expressly rejected in *Campbell v. Haverhill* (1895), 155 U. S. 610 (cited in Op. Br. p. 26; Rep. Br. p. 8, and Appendix), where the Supreme Court held an action in a federal court for patent infringement to be barred by a Massachusetts statute of limitations. There the court said (at pp. 614-615):

"It is insisted, however, that by the express terms of section 721, the laws of the several States should be enforced only 'in cases where they apply,' and that they have no application to causes of action created by Congressional legislation and enforceable only in the Federal courts. The argument is, that the law of the forum can only apply to matters within the jurisdiction of the state courts, and that the recognition given by Congress to the laws of the several states does not make such laws applicable to suits over which the state courts have no jurisdiction, because for want of jurisdiction over the subject-matter of the suit,

²As noted in our Opening Brief (pp. 24-27), state statutes of limitations have been consistently applied under the Federal Rules of Decision Act to actions in the federal courts for infringement of patents, for overtime compensation and liquidated damages under the Fair Labor Standards Act, and to actions for treble damages under the antitrust laws. Additional cases in which this Court has held such actions to be subject to the limitation period specified in California Code of Civil Procedure, Section 338, Subdivision 1 (the statute which we contend applies here) are *Burnham Chemical Co. v. Borax Consolidated, Ltd.* (9 Cir. 1948), 170 F. 2d 569; *Culver v. Bell & Lofland, Inc.* (9 Cir. 1944), 146 F. 2d 29, 31-32; and *Foster & Kleiser Co. v. Special Site Sign Co.* (9 Cir. 1936), 85 F. 2d 742, 751-752.

the tribunals of the State are powerless to enforce the state statutes with respect to it; in other words, that the States, having no power to create the right or enforce the remedy, have no power to limit such remedy or to legislate in any manner with respect to the subject-matter. But this is rather to assert a distinction than to point out a difference . . .”

And further, at pages 616-617:

“Recurring then to the main proposition above stated, it may be well questioned whether there is any sound distinction in principle between cases where the jurisdiction is concurrent and those where it is exclusive in the Federal courts. The section itself neither contains nor suggests such a distinction. The language of the section is general that the laws of the several States shall be regarded as rules of decision in every case to which they apply, and it is at least incumbent upon the plaintiff to show that, for some special reason in the nature of the action itself, the section does not apply. But why should the plaintiff in an action for the infringement of a patent be entitled to a privilege denied to plaintiffs in other actions of tort? If States cannot discriminate against such plaintiffs, why should Congress by its silence be assumed to have discriminated in their favor? Why, too, should the fact that Congress has created the right, limit the defenses to which the defendant would otherwise be entitled? Is it not more reasonable to presume that Congress, in authorizing an action for infringement, intended to subject such action to the general laws of the State applicable to actions of a similar nature? In creating a new right and providing a court for the enforcement of such right, must we not presume that Congress intended that the remedy should be enforced in the manner common to like actions within the same jurisdiction?

“Unless this be the law, we have the anomaly of a distinct class of actions subject to no limitation whatever; a class of privileged plaintiffs, who, in this particular, are outside the pale of the law, and subject to no limitation of time in which they may institute their actions . . . This cannot have been within the contemplation of the legislative power. As was said by Chief Justice Marshall in *Adams v. Woods*, 2 Cranch. 336, 342, of a similar statute: ‘This would be utterly repugnant to the genius of our laws. In a country within which not even treason can be prosecuted after the lapse of three years, it can scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture.’ ”

Now that Congress has spoken by its amendment of the Federal Rules of Decision Act, the reasoning of the Supreme Court in *Campbell v. Haverhill*, *supra*, is equally applicable to the instant action even if regarded as a suit cognizable only in equity. No more reason exists for denying the application of state limitation statutes to a suit in a federal court on a federally created right which was historically enforceable only in equity than to an action in a federal court on a federally created right traditionally enforceable at common law. In either case the provision of the Rules of Decision Act giving controlling effect to Acts of Congress leaves it completely within the power of that body to specify the limitation period which it deems appropriate for actions for the enforcement of any right created by federal law. When Congress does not specify such a period, it is entirely reasonable to assume that it is satisfied to have the limitation statutes of the several states applied under the Rules of Decision Act.

Amicus curiae argues that no reason exists in this case for applying state rules in federal courts (A. C. Br., p. 11)

and that the nature of the reenployment remedy given veterans is unique and has peculiarly federal characteristics which eliminate the usual reasons for applying state rules of decision (A. C. Br., p. 12). It is to be noted, however, that this Court in *Tsang v. Kan* (9 Cir. 1949), 173 F. 2d 204, held that the state courts have jurisdiction of veterans' suits for reinstatement and damages under the Selective Service Act, concurrent with that of the federal courts, and thus apparently felt that the peculiarly federal characteristics pointed out by *amicus curiae* (*i. e.*, right to representation by United States Attorney, freedom from costs, etc.) were not sufficient to make the federal jurisdiction exclusive.

No policy against the application of state statutes of limitations is implicit in the Selective Service Act. If state statutes do not apply to veterans' reinstatement actions, then no period of limitations is applicable. Yet the policy of the Act, as evidenced by its provisions for a speedy hearing and advancement on the calendar, favors prompt action in order to enable the veteran to regain lost skills and to reenter civilian life with as little difficulty as possible. (See *Kay v. General Cable Corp.* (D. N. J. 1945), 59 Fed. Supp. 358, 360; *Daniels v. Barfield* (E. D. Pa. 1948), 77 Fed. Supp. 283, 285.)

The cases cited by *amicus curiae* do not compel any different conclusion. *Connecticut Mutual Life Insurance Company v. Schaeffer* (1876), 94 U. S. 457 (cited in A. C. Br. p. 11), involved a conflict between state and federal statutes governing rules of evidence in the federal courts; and *Byron Jackson Co. v. U. S.* (S. D. Cal. 1940), 35 Fed. Supp. 665 (cited in A. C. Br. p. 11), is not analogous, as it involved an action against the United States under the Tucker Act on a government contract, in which

the policy favoring the application of the same substantive rules of law throughout the country is far stronger than in a case like this one where a private individual is given a right against other private persons under the terms of an Act of Congress. Our case is much more analogous to the cases referred to above where statutes of limitations were applied to suits by individuals under the Fair Labor Standards Act, the anti-trust laws and the patent statutes.

Indeed the insistence of *amicus curiae* upon a perpetuation of the historical dichotomy between actions at law and suits in equity is not only lacking in logical foundation but is completely anachronistic. This is particularly true with respect to the applicability of statutes of limitations to equitable proceedings. In the earlier forms of the statutes of limitations the provisions were in express terms confined to actions at law. But the modern forms of these statutes in the American states generally declare that the periods of limitations apply to equitable suits as well as to legal actions, and the applicability of statutes of limitations to equitable proceedings appears to be unquestioned in most jurisdictions in which distinctions between legal and equitable forms of action have been abolished. (2 *Pomeroy's Equity Juris.* 5th Ed. 172, 174, Secs. 419a, 419b.) That distinction has long been abolished in California and its statutes of limitations apply equally to actions which historically would have been deemed exclusively equitable. As we have already pointed out (Op. Br. pp. 29-30, 35; Rep. Br. p. 12) the limitation period specified in Section 338, Subd. 1 of the California Code of Civil Procedure has been applied by the California courts to actions for reinstatement of police officers and school teachers under California statutory provisions giving them that right. *Jones v. Board of Police Commissioners*, 141 Cal. 96, 74 Pac. 696; *Harby v. Board of Education*,

2 Cal. App. 418; 83 Pac. 1081. Those actions to compel reinstatement are just as exclusively equitable in nature as is a veteran's action for reinstatement under the Selective Service Act.

The distinction between actions of law and suits in equity survived longer in the federal courts than it did in California and in many of the other states. That distinction was abolished, however, in 1938 with the promulgation of the Federal Rules of Procedure. The 1948 amendment to the Rules of Decision Act making state laws applicable "in civil actions in the federal courts," in the absence of controlling federal law, constituted an additional and logical step in carrying out the abolition of the historical distinction. As we have pointed out, no reason exists for denying the application of state limitation statutes to "equitable" civil actions in the federal courts based on federally created rights which has not been considered and rejected by the courts in connection with the application of state statutes of limitations to actions at law in the federal courts to enforce rights having a similar origin.

The words "in civil actions" in the Rules of Decision Act, as amended, particularly when construed in the light of the provisions in the rules that there shall be but one form of action to be known as a civil action, import no exclusion such as that contended for by *amicus curiae* and appellee. To construe that language as excluding actions, which were historically exclusively equitable in character, for the enforcement of federally created rights would deprive the amendment of any effect whatsoever and would do violence to the language used by Congress. It would leave actions of this type subject to no limitation period whatsoever without any valid reason in policy or logic for thus creating an especially privileged class of plaintiffs.

II.

The Trial Court's Finding That Appellee's Action Was Not Barred by Laches Is Not Supported by Any Substantial Evidence.

In its argument in support of the trial court's finding that laches did not exist in this case, *amicus curiae* attempts to simplify its problem by breaking down the three year and seven month period of delay into segments which are more easily explainable and which compare more favorably with periods of delay which the courts have in some cases held not to be unreasonable.

The first segment dealt with by *amicus curiae* is the year 1946 (comprising only about 28% of the total period elapsed before filing suit). It attempts to throw on appellant's shoulders the responsibility for the delay up to June, 1946, stating that until then Sanger's status was still being negotiated and he had not been told his claim was finally rejected (A. C. Br. p. 16). This, of course, is contrary to the undisputed evidence, as Sanger himself admitted that he was informed by Kerr in December, 1945 or January, 1946 that the company did not believe he had any rights under the Selective Service Act [R. 217], and the District Court found (in accordance with the Stipulation) that Plomb refused to reinstate Sanger on his pre-war basis at the time when he applied for reemployment in January, 1946 [Find. VI, R. 13]. Further evidence that Sanger was under no illusions on this score appears in his own first letter to the Selective Service officials written on March 20, 1946, in which he said that "Mr. Kerr refused to give me my old job back" and sought assistance in "obtaining my old position again" [Ex. 33].

Amicus curiae attempts to justify the delay during the latter half of 1946 by a discussion of the time-consuming

nature of the activities required by law of the Director of Selective Service in attempting to arrange an amicable adjustment (A. C. Br. pp. 17-18), which in this case terminated without success in October, 1946, and further by pointing out that during November and December, 1946, the United States Attorney had to make his own determination as to the merits of the claim (A. C. Br. p. 19).

The second segment into which *amicus curiae* divides the period of delay begins with the transmission of the case to the United States Attorney in November, 1946, and ends in February, 1948, when the United States Attorney at Chicago must have concluded, in performing his legal duty under Section 8(e) of the Act, that he was not "reasonably satisfied" that Sanger's claim was valid, and when he returned the file to Sanger with a refusal to represent him [A. C. Br. pp. 19-20; R. 14]. No explanation whatever is given for the delay during this period of some fifteen months except a further discussion of the assertedly necessarily slow speed with which the wheels of government move. There is of course no evidence as to the actual activities of the United States Attorney during this period, nor is there any indication that Sanger did anything during that period to hurry the completion of the administrative processes referred to by *amicus curiae*. The record is clear however that Plomb heard nothing from either Sanger or the government officials from December, 1946, when Pendleton and Kerr met Sanger in Atlantic City [R. 134-135, 179-180] until its counsel received the letter of February 28, 1948, from Sanger's private counsel in

Chicago [Ex. 38]. This fourteen months of silence would have justified Plomb in concluding that the claim had been abandoned or at least, as apparently was the fact, that the government officials had determined that it was without merit.

Although in some cases delay resulting from inaction of government officials has been said not to be the fault of the veteran, we have seen no case which goes so far as to excuse on that ground a delay of over two years such as that here involved (15 months with the United States Attorney plus the additional time theretofore consumed by the Selective Service officials).³ We submit that delays of gov-

³Mr. Sanger was in no way ignorant of the law or procedure as was the case in *Juchich v. Syracuse Baseball Club, Inc.* (N. D. N. Y. 1948), 15 C. C. H. Labor Cases, Para. 64,689 (cited A. C. Br. p. 21) where the court excused a delay of about six months on that ground. In *Hayes v. Boston & Maine R. R.* (D. Mass. 1946), 66 Fed. Supp. 371, affirmed (1 Cir. 1947), 160 F. 2d 325 (A. C. Br. p. 21), the delay was only five months, and the opinion contains no mention of the delay being attributable to government officials. In *Coon v. Liebmann Breweries, Inc.* (D. N. J. 1949), 86 Fed. Supp. 333 (A. C. Br. p. 21), the total delay was only fifteen months, rather than the three years and seven months present in this case. The other cases cited by *amicus curiae* in support of its contention that delay resulting from inaction of government officials cannot give rise to laches are readily distinguishable (see A. C. Br. p. 21, note 15). In *N. L. R. B. v. Sun Tent Luebbert Co.* (9 Cir. 1945), 151 F. 2d 483, 488, and *N. L. R. B. v. Andrew Jergens Co.* (9 Cir. 1949), 175 F. 2d 130, 134, the delay in question was that of the National Labor Relations Board in deciding the case in the first instance; and in *Fleming v. Tidewater Optical Co., Inc.* (E. D. Va. 1940), 35 Fed. Supp. 1015, 1017, the respondent's argument apparently was that the government's investigator should have acted sooner rather than to permit the occurrence of sixteen months of violations of the Fair Labor Standards Act.

ernment officials cannot go on forever without constituting laches, particularly where the explanation of the delay rests only upon the basis of rather doubtful judicial notice of the administrative processes involved and where the evidence does not show that the veteran was sufficiently interested to attempt to speed up those processes.

The third segment of the period of delay, which *amicus curiae* very properly makes no attempt to explain, consists of the nineteen months from February, 1948, when the United States Attorney turned over the file to Sanger, until September 22, 1949, when this action was filed. During that nineteen months Sanger himself was in complete control of the matter and the fact that more than two years had already elapsed since the initial refusal of reinstatement should have increased his responsibility to act promptly. Nevertheless he delayed until nine months after the last of several positive rejections of his claim on November 4, 1948 [Ex. 46].

Neither appellee nor *amicus curiae* has pointed out the slightest evidentiary support for the finding that appellant contributed to the delay. As noted above, *amicus curiae* contends only that appellant contributed to the delay up to June, 1946 (A. C. Br. p. 16), after which three years and three months elapsed before the action was filed. At no time during the entire period did appellant deviate from its original position taken in January, 1946, that Mr. Sanger had been an independent contractor and hence was not entitled to reinstatement on his pre-war basis as demanded by him. Appellant simply showed common

courtesy in conferring and corresponding with Selective Service officials and with Sanger's private counsel [Exs. 35-47].⁴

Amicus curiae argues that there was no unreasonable delay in 1946 and that delays thereafter are irrelevant because they could not have prejudiced appellant during 1946, the only year for which damages were awarded (A. C. Br. p. 20). But the delay is prejudicial to the employer, not only because he is required to pay twice for services already rendered, but also because of the obvious fact that reinstatement of the veteran after others have carried on his work during the three years and seven months while the veteran delayed filing suit must cause far greater disruption of the employer's organization and business than it would at an earlier time when the veteran's contact with the employer's business was fresher and when the acquaintance of other employees with the veteran's particular job was of less duration. Furthermore, this approach is completely at variance with the views of substantially all the courts which have considered the problem and which

⁴Of the cases cited by *amicus curiae* in purported support of the proposition that appellant is barred from asserting laches because it contributed to the delay (A. C. Br. p. 16), none is factually comparable to this case. In *Byrd v. North American Aviation Co.* (S. D. Cal. 1948), 15 C. C. H. Labor Cases, Para. 64,614, the employer had purported to reinstate the veteran and had placed him in a lay-off status with a promise to recall him in the future, which the court found was made in bad faith and without intention of performing. There was no discussion of the employer's contribution to the delay in *Special Service, Inc. v. Delaney* (5 Cir. 1949), 172 F. 2d 16, or in *Hayes v. Boston & Maine R. R.* (D. Mass. 1946), 66 Fed. Supp. 371, affirmed (1 Cir. 1947), 160 F. 2d 325; and in *Watkins Motor Lines v. De Galliford* (D. Ga. 1947), 13 C. C. H. Labor Cases, Para. 63,880, affirmed (5 Cir. 1948), 167 F. 2d 274, the court merely stated that the employer was responsible for much of the delay without reference to the facts.

have held that a delay of only a few months in filing suit precludes the award of damages for any period *prior to the commencement of the action* (see Op. Br. pp. 65-68 and cases therein cited).

In any event, for the purpose of applying the doctrine of laches, prejudice is presumed to have resulted from the delay where, as here, the statutory period of limitations has run. As the court said in *Wilson v. Plutus Mining Co.* (8 Cir. 1909), 174 Fed. 317, an equity suit (at pp. 320-321):

“ . . . When a suit is brought within the time fixed by the analogous statute, the burden is on the defendant to show, either from the face of the bill or by his answer, that extraordinary circumstances exist which require the application of the doctrine of laches, and, *when such a suit is brought after the statutory time has elapsed, the burden is on the complainant to show, by suitable averments in his bill, that it would be inequitable to apply it to his case. . . .*”

See also:

Taylor v. Salt Creek Consolidated Oil Co. (8 Cir. 1922), 285 Fed. 532, 540-541.

The effect of awarding Sanger damages based on 1946 earnings, when coupled with the extreme delay here present, was to permit Sanger to wait until it became obvious that Plomb's business for 1946, which appellee characterizes as the “cream year” of all (App. Br. p. 55), would yield him more than he had earned from other sources during the same period and would thus make the suit profitable even if his recovery were made subject to offset for his other earnings, as might have been expected. This result was never intended by the Selective Service Act, and such

speculative waiting is not favored by courts of equity. In *Taylor v. Salt Creek Consolidated Oil Co.* (8 Cir. 1922), 285 Fed. 532, *supra*, the court, in holding an action to establish an interest in oil lands to be barred by laches, said (p. 544):

“It was a period of speculative, watchful waiting on his part. Such speculative waiting is not favored in equity, . . .”

In summary, an over-all view of the facts demonstrates the lack of equity in Sanger's case. His early knowledge that appellant refused reinstatement on his pre-war basis, his lack of interest during the entire time that the file was in the hands of the United States Attorney, his delay of nineteen months following the return of the file to him, his speculative waiting, and his gross earnings of nearly \$90,000 from other sources during the period of delay, when compared with the prejudice to appellant, both in terms of dollars and disruption of its organization, serve to demonstrate that this is a proper case for the application of the doctrine of laches.

While citing and quoting from the case of *Russell v. Todd* (1940), 309 U. S. 280 (A. C. Br. pp. 13-14, note 12), *amicus curiae* chooses to ignore the portion of the opinion in that case relied on in our Opening Brief (pp. 34-35) where the court said through then Mr. Justice Stone (309 U. S. at 293):

“We take it that in the absence of a controlling act of Congress federal courts of equity, in enforcing rights arising under statutes of the United States, will without reference to the Rules of Decision Act adopt and apply local statutes of limitations which are applied to like causes of action by the state courts. . . .”

As already pointed out (Op. Br. pp. 34-35; Rep. Br. p. 12) *Russell v. Todd* was a suit of exclusively equitable cognizance involving enforcement of a federal statutory right, and the only reason that the court in that case did not adopt and apply by analogy the state statute of limitations was that it was there shown that the state courts did not apply that statute to equitable actions. Here the California statute on which we rely has clearly been applied by the California courts to equitable actions for reinstatement, and no ground for refusing to apply it exists on the basis of any "special equitable doctrines" such as those referred to by the court in *Russell v. Todd* in its footnote in 309 U. S. p. 288 (quoted by *amicus curiae* in the second paragraph of note 12, A. C. Br. p. 14).

Conclusion.

The 1948 amendment to the Rules of Decision Act makes state statutes of limitations binding upon the federal courts in exclusively equitable actions for the enforcement of federal statutory rights, in the absence of a limitation period specified by Congress. Furthermore, appellee was guilty of laches, and in any event under the rule of *Russell v. Todd*, *supra*, the three-year state limitation period applicable to like equitable actions should have been applied by analogy wholly aside from the Rules of Decision Act.

On either ground, the action should have been held to be barred by delay, and the judgment of the District Court should be reversed.

Respectfully submitted,

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No. 12873.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE PLOMB TOOL COMPANY, a corporation,

Appellant,

vs.

LIONEL H. SANGER,

Appellee.

Appellant's Reply to Appellee's Memorandum
Following Oral Argument.

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NOV 20 1951

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE PLOMB TOOL COMPANY, a corporation,

Appellant,

vs.

LIONEL H. SANGER,

Appellee.

Appellant's Reply to Appellee's Memorandum Following Oral Argument.

Before replying to appellee's "defense in depth," we wish to point out that *Moore v. McDuffie* (9 Cir., 1934), 71 F. 2d 729, 732, cited in appellee's memo (p. 1), does not in any way bear on our contention that the 1948 amendment of the Rules of Decision Act requires the application of state statutes of limitations in equity suits as well as in legal actions based upon federal rights. The *McDuffie* case antedated the Supreme Court decisions in *Erie R. R. Co. v. Tompkins* (1938), 304 U. S. 64; *Ruhlin v. New York Life Ins. Co.* (1938), 304 U. S. 202; *Guaranty Trust Co. v. York* (1945), 326 U. S. 99; and *Holmberg v. Armbrecht* (1946), 327 U. S. 392, all of which are discussed in Appellant's Reply Brief, pages 8-10. Judge Garrecht's decision in the *McDuffie* case can have no real bearing upon the question as to whether *Holmberg v. Armbrecht* was in effect overruled by the 1948 amendment to the Rules of Decision Act.

We now turn to the principal subject of appellee's memo.

The Applicable Period of Limitations Is the Three-Year Period of Section 338(1) of the California Code of Civil Procedure and Not the Four-Year Period of Section 343 of That Code.

Despite appellees' positive assertion to the contrary, there *are* square holdings by California courts that reinstatement actions based on California statutory provisions are barred by the three-year limitation period specified in Section 338(1) of the California Code of Civil Procedure.

In *Harby v. Board of Education*, 2 Cal. App. 418 (83 Pac. 1081),¹ the action to compel the admission of the petitioner to a position as vice principal of a school was brought three years and seven months after her removal therefrom. The defendants demurred to the complaint on the basis of the two-year limitation period specified in Code of Civil Procedure, Section 339(1), and the three-year limitation period of Code of Civil Procedure, Section 338(1), and the trial court sustained the demurrer. The judgment for the defendants was affirmed on appeal, and instead of relying on Section 338(1) as a mere "additional ground" for its decision, as appellee says, the appellate court said (2 Cal. App. at pp. 419-420 [83 Pac. at pp. 1081-1082]):

" . . . *We think the action is barred by the provisions of subdivision 1, section 338 of the Code of Civil Procedure.* That the statute runs against applications for writs of mandate cannot be disputed, and it commences to run when the claimant is first deprived of his right. (*Barnes v. Gilde*, 117 Cal.

¹Cited in Appellant's Opening Brief, pp. 29, 35; Appellant's Reply Brief, p. 12; and Appellant's Brief in Answer to Brief of United States as *Amicus Curiae*, p. 10.

1 [59 Am. St. Rep. 153, 48 Pac. 804]; *Barber v. Mulford*, 117 Cal. 356 [49 Pac. 206]; *Jones v. Police Commrs.*, 141 Cal. 96 [74 Pac. 696].)

“The liability of the defendants to this action depends upon the provisions of section 1793 of the Political Code. If it were not for such statute the board of education would have the right to transfer or remove teachers, being answerable only in damages for a violation of contract in cases of employment for a fixed period. (*Kennedy v. Board of Education*, 82 Cal. 483 [22 Pac. 1042].) *It is only by virtue of the provisions of the statute that the teacher has a right to be protected from removal, or that any liability to this action exists against the defendants. The relief demanded by plaintiff is derived from the statute, and would have no existence if it were not for the statute. The action is upon a liability created by statute, and is therefore barred in three years.*

. . .

“*We are also of the opinion that plaintiff’s right of action is barred by laches. She did not bring this action for more than three and one-half years after she was removed from the position she claims. . . .*”²

Thus, the applicability of Section 338(1) was a clear alternative ground for the holding in the *Harby* case and was not a mere makeweight or afterthought used to support the decision that the action was barred by laches.

Another square holding that Section 338(1) is applicable to a reinstatement action is found in *Wittman v.*

²Emphasis here, as elsewhere in this brief, is supplied unless otherwise noted.

Board of Police Commissioners, 19 Cal. App. 229 (125 Pac. 265). That was an action to compel reinstatement of the petitioner as a police captain. The action was filed three years and sixteen days after the petitioner's dismissal from his position. The defendants pleaded the three-year limitation period of Section 338(1) as a bar to the action, and the court held unequivocally that that particular statute was applicable and barred the action. There was no discussion of laches, and the bar of Section 338(1) was the sole ground for the decision.

Still another square holding that Section 338(1) applies to a reinstatement action appears in *Mayer v. Board of Police Commissioners*, 136 Cal. App. 534 (29 P. 2d 458), in which a hearing was denied by the California Supreme Court on March 29, 1934. That was an appeal by the Board of Police Commissioners from a judgment directing that petitioner be reinstated as a policeman, and that he be paid accrued salary from the date of his suspension. The appellate court reversed the judgment, holding that the action was barred by the three-year limitation period of Code of Civil Procedure, Section 338, and specifically stating that laches had *not* been shown to exist.

Additional authorities to the same effect are: *Curtin v. Board of Police Commissioners*, 74 Cal. App. 77 (239 Pac. 355), where the delay was three years and ten months and where the court held the action barred by Section 338(1) and by laches; and *Leahey v. Department of Water and Power*, 76 Cal. App. 2d 281 (173 P. 2d 69), hearing denied by the Supreme Court November 25,

1946, where there was sixteen years' delay in seeking reinstatement, but where the court clearly held that the applicable statute of limitations was Section 338(1), saying (76 Cal. App. 2d at p. 286, 173 P. 2d at p. 72):

“ . . . An application for a writ of mandate to compel the reinstatement of a public official who has been dismissed is barred by the statute unless the proceeding is commenced within three years after the dismissal. (Code Civ. Proc., §338, subd. 1 . . .)

“ . . . The nature of the right sued upon, and not the form of the action or the relief demanded, determines the applicability of the statute of limitations. (Citing cases.) Respondent is endeavoring to enforce a liability claimed to have been created in his favor by the city charter, save for the existence of which no relief would be possible and this action would not have been brought. A charter is a statute of the state (citing cases) and an action thereunder is governed accordingly.”

Thus, while it is true that the seven-year period of delay in *Jones v. Board of Police Commissioners*, 141 Cal. 96 (74 Pac. 696), made it unnecessary for the court there to choose between Section 338(1) and Section 343, the above cases constitute a complete answer to the appellee's challenge. They show conclusively that there is no merit in his contention that the three-year period of Section 338(1) is inapplicable and that this action was timely because it was brought within the four-year limitation period of Section 343 of the California Code of Civil Procedure.

Appellee's position appears to be that Section 343 applies “to all suits in equity not strictly of concurrent cog-

nizance in law and equity,” and that this statutory action for reinstatement and damages is such an exclusively equitable suit. Such position is fallacious because it ignores the foregoing cases and because it misinterprets the general scheme of the California limitations statutes under which specific statutes apply equally to actions at law and to suits in equity.

Although we have doubt that this action is exclusively equitable in character,³ it is clearly no more “exclusively equitable” than is an action for reinstatement of a police officer or school teacher under a California statute conferring that right. And the cases cited above show conclusively that reinstatement actions of the latter sort are barred by the three-year period of Section 338(1).

The general scheme of the California limitations statutes further shows the inapplicability of the four-year period of Code of Civil Procedure, Section 343. That section follows a series of sections (commencing with Section 335 and including Section 338(1) upon which we rely), each of which specifies a different limitation period depending upon the subject matter in controversy and the nature of the particular right sued upon. Section 343 is a catch-all which provides:

“An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued.”

The fact is that California statutes of limitation have always applied equally to actions at law and to suits in equity and that Section 343 applies only where no other

³See Appellant's Reply Brief, page 7, and Appellant's Brief in Answer to Brief of United States as *Amicus Curiae*, page 2.

limitation period is specifically applicable. In determining the applicable statute in any given case, the inquiry is not as to whether the action is legal or equitable, but rather is whether the action of either type falls within the purview of one of the specific limitation statutes or falls within the catch-all provision for want of an applicable specific provision. In *Lord v. Morris*, 18 Cal. 482, Chief Justice Field said (pp. 486-487):

“The Statute of Limitations of this State differs essentially from the statute of James I., and from the Statutes of Limitation in force in most of the other States. Those statutes apply in their terms only to particular legal remedies, and hence Courts of Equity are said not to be bound by them except in cases of concurrent jurisdiction. In other cases Courts of Equity are said to act merely by analogy to the statutes, and not in obedience to them. . . . *The case is entirely different in this State. Here the statute applies equally to actions at law and to suits in equity. It is directed to the subject matter and not to the form of the action, or the forum in which the action is prosecuted.* Nor is there any distinction in the limitation prescribed between simple contracts in writing and specialties. Thus the statute requires an action ‘upon any contract, obligation, or liability founded upon an instrument of writing,’ except a judgment or decree of a Court of a State or Territory, or of the United States, to be commenced within four years after the cause of action has accrued. *It matters not whether damages be sought for a breach of the contract, and thus an action at law be brought, or a specific performance*⁴

⁴Pomeroy classifies an action for specific performance as one of exclusively equitable cognizance. (1 Pomeroy’s Equity Jurisprudence, 5th Ed., Section 138, pp. 189-190.)

be prayed, and thus a suit in equity be commenced, the proceeding must in either case be taken within the limitation designated. (See *Pearis v. Covillaud*, 6 Cal. 617.) The statute, after prescribing certain periods within which actions upon judgments, upon simple contracts, for relief on the ground of fraud, and for other causes, shall be brought, declares, in general terms, that ‘an action for relief’ not thus provided for must be commenced within four years after the cause of action shall have accrued—covering all cases where equitable or other relief may be sought.”

This principle is further illustrated in *Boyd v. Blankman*, 29 Cal. 19, where an equitable action to establish and enforce a trust on the ground of fraud was held to be within the purview of the three-year statute of limitations applicable to actions for relief on the ground of fraud, rather than the longer period of the catch-all statute. The court there said at page 44:

“The defendant relies on the Statute of Limitations as a defense to the action. The statute is applicable alike to all causes of action—to a cause of action in equity as well as one at law. The statute governing this case is found in the fourth subdivision of division third of section seventeen of the act concerning the limitations of civil actions, which is as follows: ‘Within three years . . . an action for relief on the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud.’ . . .”

The United States Supreme Court long ago recognized this operation of the California statutes of limitations in

Case of Broderick's Will, 21 Wall. 503. That was a suit in equity to set aside the probate of a will in California on the ground that it was a forgery. The Supreme Court held that a court of equity had no jurisdiction to avoid a will on the grounds of fraud or forgery, that being within the exclusive jurisdiction of the probate courts, and observed at page 518:

“But even admitting that, as to surplus proceeds, and property undisposed of, or acquired by those having actual knowledge of the fraud, the complainants might come into a court of equity on the ground of their own ignorance of the events when they transpired, they would still have to encounter the statute of limitations, which expressly declares that action for relief on the ground of fraud can only be commenced within three years; and the statutes of limitation in California apply to suits in equity as well as to actions at law. . . .”

The cases relied upon by appellee do not support his contention that the catch-all Section 343 applies to all exclusively equitable actions.

Freeman v. Donohoe, 65 Cal. App. 65 (223 Pac. 431), relied on by appellee, was an equitable action for an accounting and settlement of a partnership. The court considered the various specific limitation statutes contained in the Code of Civil Procedure and concluded that the action did not fall within the purview of any of those specific sections, and hence that the only applicable statute was the four-year catch-all provision of Section 343. The language quoted by appellee from that case (at p. 2 of Appellee's Memorandum) was in fact quoted by the court there from the decision in *Piller v. Southern Pacific Company*, 52 Cal. 42, in which case that language was pure

dictum. The *Piller* case was a legal action for damages for personal injury based upon negligence, and the court held that the action was barred by the two-year period of Section 339, as it then stood, rather than by the four-year period of the catch-all Section 343.

In *Moss v. Moss*, 20 Cal. 2d 640 (128 P. 2d 526), also cited by appellee, the court simply held that an action for cancellation of an agreement was governed by Section 343 after concluding that no other section of the code expressly applied to such an action. This is apparent from the following language of the court (p. 644):

“ . . . although there is no section of the code that expressly limits the time within which an action must be brought for cancellation of an instrument because of its illegality, Section 343 of the Code of Civil Procedure provides that ‘An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued.’ . . . ”

In the light of the square holdings by the California courts in reinstatement actions and of the general scheme and theory of the California statutes of limitation as set forth in the above authorities, there can be no question but that an action for reinstatement on the basis of a statutory right is governed by the three-year limitation period of Code of Civil Procedure Section 338(1) and does not fall within the four-year catch-all provision of Section 343.

Respectfully submitted,

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No. 12873

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

THE PLOMB TOOL COMPANY, a corporation,

Appellant,

vs.

LIONEL H. SANGER,

Appellee.

APPELLEE'S PETITION FOR REHEARING.

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THE PLOMB TOOL COMPANY, a corporation,

Appellant,

vs.

LIONEL H. SANGER,

Appellee.

APPELLEE'S PETITION FOR REHEARING.

To the United States Court of Appeals for the Ninth Circuit:

Appellee's judgment has been reversed upon the sole ground that the trial Court's conclusion that he was not an independent contractor was not supported by the findings.

It is now apparent that appellee's counsel gave inadequate attention in their brief to what has turned out to be the vital facet of the case. In justice to appellee, and before he is finally deprived of his rights as an honorably discharged veteran, this Court is petitioned to grant a rehearing so that consideration may be given the following points:

I. The decision is in conflict with this Court's most recent opinion on the subject.

II. Although the 80th Congress required the application of common law control doctrines under the Labor Relations and Social Security Acts, the broad coverage of the Selective Service Act was left untouched. The decision is therefore contrary to a sustained legislative policy requiring all persons upon whom a veteran was previously dependent for his regular livelihood to restore him to it upon his return from the service.

III. Two recent Selective Service Act decisions rendered since this case was briefed, give added support to appellee.

IV. When all the evidence is considered as a whole, it is sufficient to support the trial Court's conclusion that appellee was not an independent contractor.

I.

The Decision Is in Conflict With This Court's Most Recent Opinion on the Subject.

Appellee finds it impossible to reconcile this decision of the Court with its *per curiam* decision (Judges Garrecht, Mathews and Bone participating) on June 28, 1948, in the case of *Hearst Publications v. U. S.*, 168 F. 2d 751. That decision stated "on the grounds and for the reasons stated in its opinion (70 Fed. Supp. 666) the judgments of the District Court are affirmed" and thereby held that San Francisco news vendors were "employees"¹ within the meaning of the Social Security Act.

¹In *Hearst Publications v. N.L.R.B.* (C. A. 9, 1943), 136 F. 2d 608, a majority of this Court speaking through Judges Stephens and Mathews, had previously pointed out the following characteristics of a news vendor's employment:

1. Profits consisted solely of the difference between the price paid by the news vendor to the publisher and the price paid him by the public.
2. The news vendors assumed all risk of loss by destruction or theft of newspapers.
3. The news vendors dealt in other and often in competing publications.
4. A practice existed among news vendors in buying and selling valuable corners.
5. The news vendors often hired, and paid out of their own money, assistants to help them sell newspapers in their territory.
6. In addition to this, in the case of the San Francisco news vendors, there was a contract between them and the publishers which recited that it was the intent of the parties to maintain a vendor-vendee relationship and not an employer-employee relationship. (70 Fed. Supp. 666-669.)

The opinion of the District Court, adopted by this Court six months after its decision in *Brown v. Luster* (C. A. 9, 1947), 165 F. 2d 181, contains the following language:

“From these various decisions there evolves at least one principle,—determinative of this cause in favor of the employment status, entirely reconcilable with established common law doctrines as developed and grown to meet new situations, and with the remedial objectives of social security legislation, and which is, at the same time realistically practical. That is, that *any person is an employee within the meaning of social security legislation who is engaged as a means of livelihood in regularly performing personal services which (1) constitute an integral part of the business operations of another; (2) are not incidental to the pursuit of a separately established trade, business or profession,—involving in their performance capital investment and the assumption of substantial financial risk, or the offering of similar services to the public at large; and (3) are subject to a reasonable measure of general control over the manner and means of their performance.* (Citing *Matcovich v. Anglim* (C. A. 9, 1943), 134 F. 2d 834, and other cases.)

* * * * *

“It may be, therefore, that ultimately the employee status in service relationships of doubtful nature will be made to depend on the absence of such a separate business or calling and on the presence of some de-

gree of control over the manner and means of performance of the services. In fact, *it seems reasonable to regard persons earning their livelihood performing services for others, who have no established business or profession of their own and who are, in the performance of such services, subservient to the will of others, to be singularly subject to the hazards of unemployment and needy old age.* On the other hand, those protected by capital reserve or equipped with the enterprising characteristics of a free agent, are more favorably endowed with what it takes to combat their own economic ills.” (Emphasis supplied.)

The emphasis laid by this decision upon the nomenclature used in the final form of written contract between appellee and appellant corporation is also in contrast to this Court’s previous steadfast refusal to give consideration to the newsboys’ contract or the taxi-dancers’ contract in the *Matcovich* case, *supra*. And in disregarding such contracts, this Court has been supported by *Bartels v. Birmingham* (1947), 332 U. S. 126.

II.

Although the 80th Congress Required the Application of Common Law Control Doctrines Under the Labor Relations and Social Security Acts, the Broad Coverage of the Selective Service Act Was Left Unchanged. The Decision Is Therefore Contrary to a Sustained Legislative Policy Requiring All Persons Upon Whom a Veteran Was Previously Dependent for His Regular Livelihood to Restore Him to It Upon His Return From the Service.

The 80th Congress passed the Labor-Management Relations Act, 61 Stat. 137, P. L. 101, chap. 120, and in so doing amended the definition of "employee" at 29 U. S. C. A. 152(3) to expressly exclude "any individual having the status of an independent contractor."

One of the purposes of this amendment was to overrule the decision of the Supreme Court in *N.L.R.B. v. Hearst* (1944), 322 U. S. 111. (See Conference Committee Report, House Report No. 510, U. S. Code Cong. Serv., 80th Cong., 1st Sess., 1947, p. 1138.)

The 80th Congress next addressed its attention to the Social Security Act and passed the Gearhart Amendment, effective October 1, 1948 (62 Stat. chap. 468, P. L. 642, Sec. 3(d), Vol. 1, U. S. Code Cong. Serv., 80th Cong., 2nd Sess., p. 451).

Concerning this legislative act, the 1950 Annual Survey of American Law, page 243 (N. Y. Univ. School of Law) recently stated:

"The original law failed to make a precise definition of employee with the result that some courts applied the common law test of control while others developed an 'economic reality' test. This latter in-

terpretation was adopted in 1947 by the Supreme Court in the Silk and Bartels cases. In the following year Congress passed the Gearhart Amendment (62 Stat. 438-39 (1948), amending 26 U. S. C. Secs. 1426(d), 1607(i), 42 U. S. C. Sec. 1301(a) * * * which established the common-law rule as the basis for determining the employment relation. The new statute (1950 amendment) reaffirms this principle but makes exceptions for four groups under specified conditions. These are full-time life insurance salesmen, drivers-agents distributing food and beverages (excluding milk), laundry and dry-cleaning, full-time salesmen soliciting orders from merchants, hotels and similar establishments to be delivered later, and home workers operating under a state license system and with specific instruction supplied by an employer.”²

However, it is significant that Congress has never attempted by statute to change the “economic reality rule”

²Other recent and illuminating law review articles on the subject are:

“Social Security Status of Real Estate Salesmen Under the Federal Unemployment Tax Act,” 18 Geo. Wash. L. Rev. 579 (1950).

“Aspects of Legislative History of the Social Security Act Amendments of 1950,” by Wilbur J. Cohen, 4 Industrial Labor Relations Rev. 187, 193.

“Social Security—Taxicab Drivers Held Not Employees Under Social Security” (1949), 35 Va. Law Rev. 646.

“Unemployment Compensation—Commission Agents Held Employees Under Unemployment Compensation Act (1949), 35 Va. Law Rev. 802.

“Social Security: Employment Relationship: Who Are Employees?” 3 Okla. Law Rev. (1950) 349.

“Relationship of Employer and Employee—Social Security Act,” 24 Notre Dame Lawyer (1949) 578.

See also Annotations on status of “Salesmen,” 138 A. L. R. 1413, 160 A. L. R. 713, 10 A. L. R. 2d 369.

A legislative discussion of the Gearhart Amendment is found in Sen. Rep. 1255, Vol. 2, U. S. Code Congressional Service, 80th Cong., 2nd Sess., pp. 1752-75.

applied by this Court and others to the Selective Service Act. (*Dodds v. Williams* (C. A. 9, 1947), 163 F. 2d 724 ("taxi-cab fleet operator"), opinion by Mathews, J., citing with approval *McMillan v. Montecito Country Club* (D. C., S. D. Cal.), 65 Fed. Supp. 240 ("golf pro"); *Lee v. Remington-Rand* (D. C., S. D. Cal.), 68 Fed. Supp. 837 ("traveling commission salesman").)

At page 38 of his brief, appellee cited decisions from the First, Second, Third, Seventh and Tenth circuits, all of which extended Selective Service Act coverage to commission salesmen. To this list there should now be added a decision from the Fourth Circuit—*Bowen v. Home Beneficial Life Ins. Co.* (C. A. 4, 1950), 183 F. 2d 376.

Mr. Justice Rutledge said in *U. S. v. Silk* (1937), 331 U. S. 704, 721:

"* * * the balance in close cases should be cast in favor of rather than against coverage, in order to fulfill the statute's broad and beneficial objects."

Following this in *Bartels v. Birmingham* (1947), 332 U. S. 126, 130, Mr. Justice Reed said:

"* * * in the application of social legislation, *employees are those who as a matter of economic reality are dependent upon the business to which they render service.*" (Emphasis supplied.)

Appellee respectfully submits that this "economic reality" rule has been allowed by Congress to continue in its application to the Selective Service Act and that such an application is required by the liberal construction rule announced in *Fishgold v. Sullivan Drydock and Repair Corp.* (1946), 328 U. S. 275, 285:

"This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need."

III.

Two Recent Selective Service Act Decisions Rendered Since This Case Was Briefed, Give Added Support to Appellee.

A. The first of these is *Travis v. Schwartz Mfg. Co.* (D. C., E. D. Wisc.), decided August 10, 1951, 20 C. C. H. Labor Cases 80,001, where a veteran who had been engaged in the sale of a manufacturer's products on a commission basis was held to have left a position in the employ of an employer rather than in the status of an independent contractor as a "manufacturer's agent," where:

1. He was paid \$20,531.22 as commissions for the year immediately preceding his entry into the service.

2. He had been selling defendant's products since 1933 and was paid solely from commissions during all of that time except a period of 18 months in 1934 and 1935 when he was paid in addition a fixed salary of \$100 a month while breaking in a new line.

3. Plaintiff paid his own traveling expenses and furnished his own car but the company paid his expenses at conventions which he attended at its direction.

4. The employment by him of an assistant was held not sufficient to establish an independent contractor's status.

5. Although his hours of work were not prescribed by the company, it kept a close check on his efforts, activities and results.

6. He was free to sell products of other manufacturers but only at the risk of losing part of his sales territory or his job if such activities interfered with his sales' effort for the company.

7. No Social Security taxes were paid for him except during three months in 1937 and an additional three weeks just before he entered the service.

8. He was not referred to by the company as an independent contractor but always as a member of the company organization.

9. He received from the company frequent and detailed instructions and orders governing his activities.

10. His income depended solely upon commissions earned by his own sales' efforts and he had no opportunity for profit or loss in the business.

11. He maintained no office other than a desk, typewriter and filing cabinet in his own home.

The District Court carefully considered the criteria set out by this Court in *Brown v. Luster, supra*, and then said at page 80,013:

"There are certain other facts which must be weighed if we are to follow the further standard of that case, that is that 'in each case all of the facts must be considered together.' "

B. The second case lays at rest the *state statute of limitations question* which was stressed by appellant as the

first point in its brief and upon which the United States filed its *amicus* brief herein.

This case is *Wintuft Corporation v. Fuquea* (20 C. C. H. Labor Cases, par. 66,567, not yet officially reported) decided by the Court of Appeals for the Fifth Circuit on October 19, 1951, affirming the District Court's decision (17 C. C. H. Labor Cases, par. 65,371).

Appellee is indebted to counsel for *amicus curiae* for the following statement regarding the *Wintuft* decision:

"The Court of Appeals' opinion did not make it exactly clear what the decision was concerning the application of state statutes of limitations to the causes of action for reemployment or damages arising under Section 8 of the Selective Training and Service Act of 1940. *Amicus curiae* therefore obtained the transcript of record and the briefs of the parties in order to ascertain exactly what issue was determined in that case. The briefs and the record make it clear that the Court of Appeals held that state statutes of limitation are not applicable to an action arising under this statute.

"The veteran, Fuquea, did not seek reinstatement but asked for damages only and the employer apparently had ceased operations at the time of the suit. In the District Court, the employer filed a 'plea of statute of limitations' stating that 'plaintiff's cause of action, if he had any, accrued more than twelve months next before the commencement of this suit.' [Wintuft record, 24]. Several subsequent pleas along the same line were also filed [Wintuft record, 25,

27]. The District Court overruled the motions for dismissal based on these pleas [Wintuft record, 23, 25, 29].

“These pleas did not make it quite clear that the employer was relying on a state statute of limitations. On appeal, however, the employer in his brief expressly relied on Georgia statutes of limitation, one of which established a one-year period and another of which established a two-year period (cited by the employer as Georgia Code, vol. 3, Sec. 704 (4360) and Georgia Code, vol. 3, p. 714 (4370)). The principal judicial authority cited by the employer was *Walsh v. Chicago Bridge and Iron Company*, 90 F. Supp. 322, which was examined in the briefs of the parties and *amicus curiae* here.

“On the basis of this contention, the Court of Appeals for the Fifth Circuit stated ‘the defendant is here making three points against the charges: (1) That the action was barred by a state statute of limitations * * *. We cannot agree. The District Judge gave careful consideration to the asserted plea of limitation and to the facts of record. His judgment denying the defenses of limitation and laches was correct.’

“It is therefore apparent that the Court of Appeals for the Fifth Circuit has squarely held that state statutes of limitations do not apply in veterans’ suits under this Act.”

IV.

When All the Evidence Is Considered as a Whole, It Is Sufficient to Support the Trial Court's Conclusion That Appellee Was Not an Independent Contractor.

This Court in its decision (p. 5, Pernau-Walsh printing, footnote 3) cited the case of *Waggaman v. General Finance Co.* (C. A. 3), 116 F. 2d 252, which contains the following language at page 258:

“At least it may be said that it is not clear that a master and servant relationship did not exist between the appellant and McWilliams. The question was therefore properly one for the jury. See Restatement of the Law, Agency, Sec. 220. On the record before us, it would be no less than a usurpation of the jury's province for the court to say as a matter of law, that a master and servant relationship did not exist between the appellant and McWilliams.”

The nature of the relationship of employee or independent contractors is primarily a question of fact. The test, as in the case of other factual questions, is not what this Court would have found under the facts, but whether the finding of the trial court is supported by any substantial evidence, including reasonable inferences from that evidence. (*Washko v. Stewart*, 20 Cal. App. 2d 347, 349 (67 P. 2d 144); *Malvich v. Rockwell*, 91 Cal. App. 2d 463, 468 (205 P. 2d 389); *Pacific Lbr. Co. v. Industrial Acc. Com.*, 22 Cal. 2d 410, 422 (139 P. 2d 892); *Candido v. California Emp. etc. Com.*, 95 Cal. App. 2d 338, 340 (212 P. 2d 558).) “It is only where but one inference can reasonably be drawn from the evidence that the question of whether one is an employee or an independent contractor becomes one of law for the courts.”

(*Burlingham v. Gray*, 22 Cal. 2d 87, 100 (137 P. 2d 9); to the same effect see *National Auto. etc. Co. v. Industrial Acc. Com.*, 80 Cal. App. 2d 769, 772 (182 P. 2d 634); *Perguica v. Industrial Acc. Com.*, 29 Cal. 2d 847, 859 (179 P. 2d 812).)

In *Walling v. Plymouth Mfg. Corp.* (C. A. 7, 1943), 139 F. 2d 178, Minton, J., held a finding that a manufacturing corporation was not an "employer" within the Fair Labor Standards Act was not so clearly erroneous as to justify interference by the reviewing court.

In *McCombs v. Robert W. Hunt Co.* (C. A. 7, 1949), 172 F. 2d 751, Minton, J., again held in a case under the Fair Labor Standards Act that a determination by the District Court that a senior inspector was an administrative "employee" was not clearly erroneous and would not be disturbed on appeal.

In *Smith v. Porter* (C. A. 8, 1944), 143 F. 2d 292, the finding of a judge sitting without a jury that certain foremen were "employed" in an executive capacity was one which would not be set aside on appeal unless clearly erroneous.

Where the construction given an instrument by the trial court appears to be consistent with the true intent of the parties as shown by the evidence, another interpretation will not be substituted on appeal although it might, without consideration of the evidence, seem equally tenable.

Johnson v. Landucci (1942), 21 Cal. 2d 63, 69, 130 Pac. 405, 148 A. L. R. 1355.

The decision does not recite all of the facts found or the uncontroverted facts upon which the trial court concluded that appellee left a position in the employ of appellant and that his pre-war status with appellant was not

that of an independent contractor. This Court in its opinion (pp. 3-4, Pernau-Walsh printing) recites only a part of the facts stipulated and included within the findings.

It is submitted that this summary of the evidence by the Court presents only one side of the coin. Appellee therefore submits the following tabular summary to enable this Court to consider all the evidence before the trial court.

FACTS RECITED BY THIS COURT'S DECISION.	FACTS <u>NOT</u> RECITED IN THIS COURT'S DECISION.
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Contracts and Nomenclatures.

"Appellee sold merchandise for appellant in a specified territory under a written contract² which was terminable upon 30 days' written notice by either party." (Footnote 2—"although appellee had sold the products of appellant in the Kansas City territory for nine years prior to November, 1942, it was not until January 18, 1941, that the terms of their arrangement were reduced to a written contract. On December 8, 1941, appellant wrote to appellee proposing that the previous written contract

This is incorrect. Appellee's first contract [Ex. 7] was three years earlier. It is true that until 1938 appellee never had any written contract with Plomb [R. 39]. In the 1938 contract

**FACTS RECITED BY THIS
COURT'S DECISION.**

'under which you sell our tools as an independent contractor' be extended for a further period of one year. Appellee accepted this proposal in writing on December 16, 1941.")

"The written contract of the parties above referred to expressly provided that no employer-employee relationship was established by this writing, and the supplemental agreement of December 8, 1941, extending the previous written contract for another year referred to it as 'the contract * * * under which you sell our tools as an independent contractor. * * *.' "

**FACTS NOT RECITED IN
THIS COURT'S DECISION.**

[Ex. 7] he was denominated a "salesman"; in the 1939 contract [Ex. 8], he was a "representative."

There was no such stipulation against employee-employer relationship in the "salesman" contract of 1938 [Ex. 7] or the "representative" contract of January 1, 1939 [Ex. 8].

Appellant corporation's relationship with appellee before he went to war was summarized at the trial as follows:

"The Court: There was no change in the arrangement, so far as you know, from the time he first

FACTS RECITED BY THIS
COURT'S DECISION.

FACTS NOT RECITED IN
THIS COURT'S DECISION.

came into the company until he went into the service?

Mr. Pendelton: No.”
[R. 166.]

Mr. Pendelton, president of appellant corporation, was shown Exhibit 7 (the 1938 “salesman” contract) and Exhibit 8 (the 1939 “representative” contract) and he said:

“The use of ‘salesman’ in one case and ‘representative’ in the other case is purely a choice of words, and did not in any way alter the relationship between the company and Mr. Sanger.” [R. 167.]

In 1939 and in subsequent years appellant consistently referred to appellee’s status as being that of a salesman [Exs. 2, 3, 4, 5, 6, R. 36-37].

On February 20, 1940, the vice-president of appellant told Sanger that he was a “very ‘top string’ sales-

**FACTS RECITED BY THIS
COURT'S DECISION.**

**FACTS NOT RECITED IN
THIS COURT'S DECISION.**

man" [Ex. 12, R. 45] but he was cautioned to be a "good organization man."

On April 8, 1940, at a "Family Day Party," appellant conducted a presentation of service pins to Plomb Tool "employees" and appellee received one of these service pins [Ex. 13, R. 46, 184].

On April 10, 1940, appellant sent appellee a list of new jobbers in his territory in a letter addressed to all "salesmen" [Ex. 14, R. 46].

Shortly prior to September 9, 1942, appellant deducted money from appellee's commissions and used it for a donation to a clubhouse built for the employees of appellant. A letter from the president of the Plomb Employees' Association, dated September 9, 1942, stated that appellee's name was going to be on a plaque at the clubhouse [Ex. 17, R. 49, 183].

**FACTS RECITED BY THIS
COURT'S DECISION.**

**FACTS NOT RECITED IN
THIS COURT'S DECISION.**

In 1942 he was described to the United States Government by the president of appellant corporation as having been "district manager for Plomb Tool Company" for many years [Ex. 22, R. 52, 180.] On December 11, 1942, the chairman of the Board of Directors of appellant corporation also informed the Government that appellee "had been employed" by appellant for over ten years [Ex. 24, R. 55].

Appellee's letters written to appellant while appellee was in the service were published in appellant's house organ [Ex. 26, R. 55] and appellant wrote appellee on December 24, 1942 [Ex. 25, R. 55], and again on December 31, 1942, asking for a picture of him in his uniform to be printed in their house organ [Ex. 27, R. 56].

**FACTS RECITED BY THIS
COURT'S DECISION.**

**FACTS NOT RECITED IN
THIS COURT'S DECISION.**

Mode of Payment.

“Appellee was paid on a commission basis.”

Activities in the Field.

“He (appellee) solicited orders from whatever customers he selected and that he determined his own working hours, sales routes, and itineraries, using whatever selling techniques he desired.”

Appellee was requested by appellant corporation to make reports concerning his itineraries but appellee did not follow any regular reporting plan as requested [Ex. 50, 6(e)].

Appellee corporation from time to time furnished appellee names and customers in his territory from whom appellant received inquiries and appellee reported to appellant regarding the same. [Ex. 50, 6(e).]

From time to time appellant corporation requested appellee to report to it upon his activities in collecting past-due accounts. Appellant corporation had the final authority on extension of credit to customers [Ex. 50, 6(h) ; Ex. 4].

FACTS RECITED BY THIS
COURT'S DECISION.

FACTS NOT RECITED IN
THIS COURT'S DECISION.

Appellee made suggestions to appellant corporation to improve its sales [R. 84]. He assisted the designing of many special tools [Ex. 22, R. 181].

Appellee's duties even included repair and maintenance work. He testified as follows:

"It was up to me as a salesman to keep that board in repair and clean. In other words, about once or twice a year, depending on the dust storms we had, all the tools would have to come down, those boards be washed and wiped off, sometimes revarnished and new brackets for new numbers of tools that were manufactured be installed on those boards." [R. 102.]

Appellee did this work and was furnished a complete tool kit with varnish and paint and brackets by appellant corporation. He

FACTS RECITED BY THIS
COURT'S DECISION.

FACTS NOT RECITED IN
THIS COURT'S DECISION.

was given another kit to repair broken tools that the jobbers would give him on regular calls [R. 102].

Other Lines.

“Appellee was permitted to, and did, represent other manufacturers and for the two-year period immediately prior to his entry into the armed services some 43% of his gross income was derived from sales activities on behalf of other manufacturers.”

It was appellant corporation, not appellee, who made the original arrangement whereby appellee would carry the lines of other manufacturers [R. 31]. This arrangement was in line with industry practice. Morris Pendleton, president of appellant corporation, testified at the trial as follows:

“When companies are small and their sales volume is small, it is very common in the tool business of various sorts for sales to come through manufacturers' agents; and, as a matter of neighborliness, if several companies have a territory in which they want representation, for them to jointly use the same person to represent them.”
[R. 164.]

**FACTS RECITED BY THIS
COURT'S DECISION.**

**FACTS NOT RECITED IN
THIS COURT'S DECISION.**

Payment of Expenses.

“He (appellee) paid his own expenses.”

In December, 1939, appellant corporation paid appellee's expenses to attend a sales meeting in Los Angeles [R. 44].

Appellant corporation paid appellee \$30.00 in January, 1941, in partial reimbursement of his expenses in attending an Automotive Service Industry convention [Ex. 50, 6(d)].

Equipment Furnished.

Appellant corporation made its own display truck available to appellee and paid him \$200 in December, 1941, for repairs and tires for said truck [Ex. 50, 6(d)].

Appellant corporation furnished appellee stationery with its name on it [R. 85].

FACTS RECITED BY THIS COURT'S DECISION.	FACTS <u>NOT</u> RECITED IN THIS COURT'S DECISION.
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Payment of Assistant.

“(Appellee) paid an assistant with his own monies and this assistant acted pursuant to his (appellee’s) instructions.”

(The veteran paid his assistants in *King v. S. W. Greyhound*, C. A. 10, 169 F. 2d 497, cert. den. 345 U. S. 891. Nevertheless, the appellate court reversed a district court decision which held the veteran to be an independent contractor.)

Sales Quotas.

“Appellee was not required to meet sales quotas.”

Appellee received a Hamilton watch as the winner of the 1938 sales contest conducted by appellant corporation [Exs. 9 and 10].

Appellee brought in every account in his territory except one and built up his sales volume every year [Ex. 31, R. 65].

Office Space.

“Nor was he (appellee) furnished an office by the appellant corporation.”

Appellee always kept on the road; he never had a desk since 1932. He merely used a mail forwarding

**FACTS RECITED BY THIS
COURT'S DECISION.**

**FACTS NOT RECITED IN
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service from the warehouse where the appellant's stock was carried [R. 79]. Appellee never paid for an office in his life. All he had was mail forwarding; he never had a chair, desk, or anything like an office [R. 82, 102].

Social Security Taxes.

“No deductions were taken from his (appellee's) commissions on account of Social Security taxes, Old Age benefits, or Unemployment Insurance.”

While the trial Court found that all of the factual matters alleged in the pre-trial stipulation were true it did not find that these were the **ONLY** facts produced in evidence before the trial Court, the stipulation being subject “to the right of either party to introduce at the trial of this action other evidence not inconsistent with the facts herein stipulated.” If this Court is dissatisfied with the sufficiency of the findings of the trial Court, it is,

of course, within its power to reverse the judgment and remand with directions to make and state expressly and more explicitly further findings of fact and conclusions of law.

3A Ohlinger's Federal Practice 204;

Mayo v. Lakeland (1940), 309 U. S. 310, 317;

National Popsicle Corp. v. Icyclair, Inc. (C. A. 9, 1941), 119 F. 2d 799;

Paramount Pest Control Service v. Brewer (C. A. 9, 1948), 170 F. 2d 553; (1949) 177 F. 2d 564;

Marlborough Corp. v. U. S. (C. A. 9, 1949), 172 F. 2d 787, opinion by Mathews, J.;

Gillis v. Gillette (C. A. 9, 1949), 177 F. 2d 7, opinion by Bone, J.;

Times-Mirror Co. v. N.L.R.B. (1947), 331 U. S. 789.

The petition for rehearing should be granted.

Respectfully submitted,

KENNY & MORRIS,

By ROBERT W. KENNY,

Attorneys for Appellee.

ARVEY, HODES & MANTYNBAND,

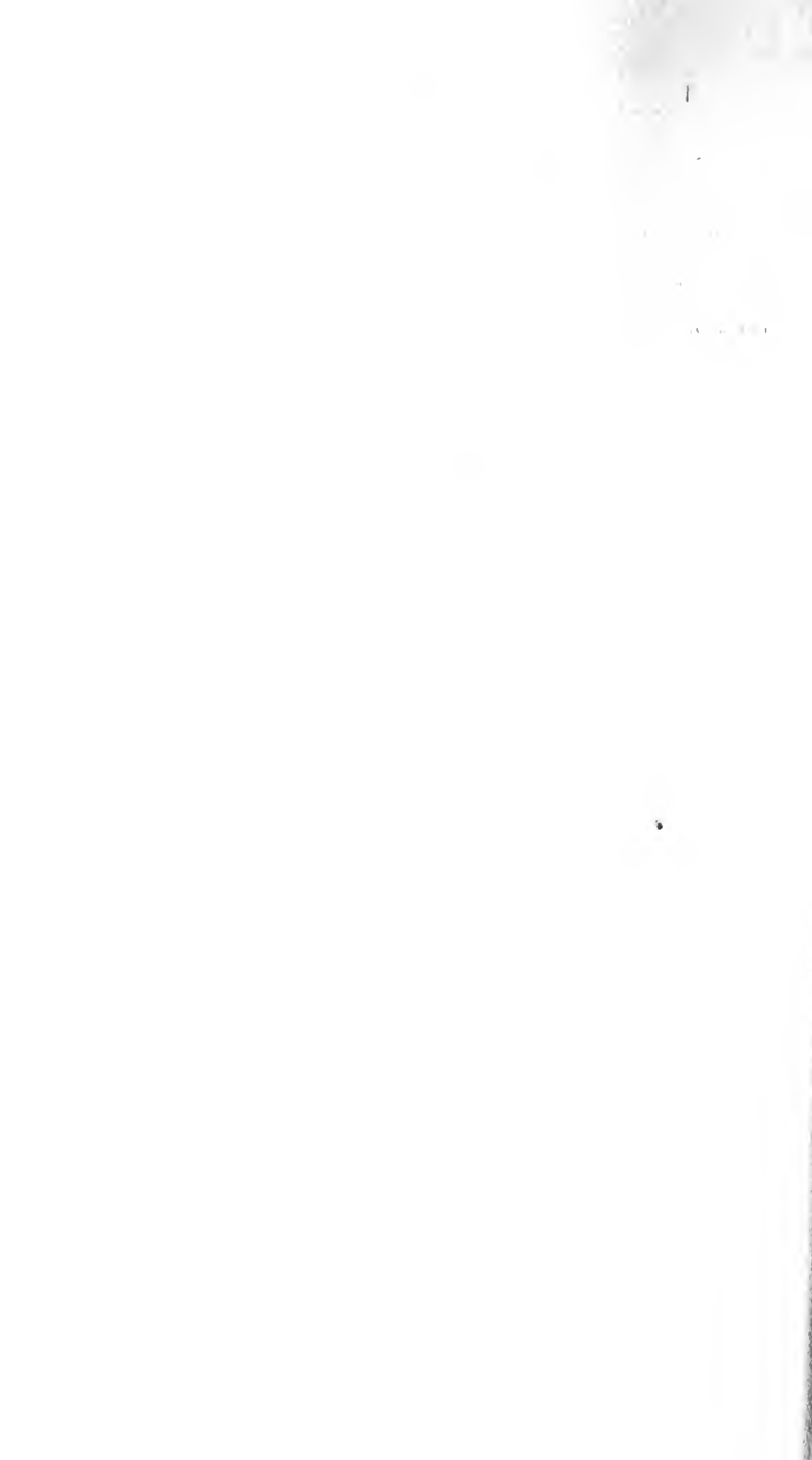
1 La Salle Street,
Chicago 2, Illinois,

Of Counsel.

Certificate of Counsel

I am one of the attorneys for the appellee. It is my judgment that this Petition for Rehearing is well founded and not interposed for delay.

ROBERT W. KENNY.



No. 12875

United States
Court of Appeals
For the Ninth Circuit.

ERNEST B. BROWNELL,

Appellant,

vs.

FRED M. MANNING, INC.,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Montana.

FILED

MAY - 9 1951

PAUL A. O'BRIEN.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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OF RECORD

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Attorneys for Appellees-Defendants.

In the District Court of the Thirteenth Judicial
District of the State of Montana, in and for
the County of Yellowstone.

No. 23467

ERNEST B. BROWNELL,

Plaintiff,

vs.

FRED M. MANNING, INC., AND ROBERT B.
HAWKINS,

Defendants.

COMPLAINT

Plaintiff for his complaint against the above-named defendants, and each of them, alleges:

I.

That at all times herein mentioned the Defendant, Fred M. Manning, Inc., was, and now is, a corporation duly organized and existing under and pursuant to the laws of the State of Oklahoma and engaged in the business of that of an oil drilling contractor and in the transportation of gasoline, oil, and other articles and commodities; that said Defendant has been, and now is, a foreign corporation authorized to transact business in the State of Montana; that in the course of said business said Defendant owned, operated, maintained, and controlled a certain so-called flat bed semi-trailer truck; that at the time **Plaintiff received his injuries** as hereinafter described, Defendant, Robert B. Hawkins, was an employee and agent of Defendant, Fred M. Man-

ning, Inc., and drove and operated said truck in the scope and course of his employment and as the agent and servant of said Defendant, Fred M. Manning, Inc., and with its consent.

II.

That on or about the 27th day of December, 1946, and for some time prior thereto, the Defendant, Fred M. Manning, Inc., negligently maintained and operated said truck with defective and inefficient brakes and braking equipment and apparatus.

III.

That one of the public highways in the State of Wyoming is known as U. S. Highway No. 20, and at the point where the [2*] accident hereinafter alleged occurred runs in a general northerly and southerly direction.

IV.

That on or about the 27th day of December, 1946, at approximately 2:30 p.m. of said day, Plaintiff was driving and operating a certain Burlington Trailways Bus owned by the Burlington Transportation Company in a general northerly direction on said U. S. Highway No. 20; that at said time the Defendant, Robert B. Hawkins, was driving and operating said so-called flat bed semi-trailer truck owned by the Defendant, Fred M. Manning, Inc., aforesaid, in a general southerly direction on said U. S. Highway No. 20; that as said motor vehicles approached and reached each other at a point ap-

*Page numbering appearing at foot of page of original Certified Transcript of Record.

proximately nine miles north of the City of Worland, in the State of Wyoming, the Defendant, Robert B. Hawkins, negligently operated said truck at an excessive and dangerous rate of speed, negligently failed to keep said truck under reasonable and proper control, negligently failed to keep a proper lookout, negligently drove and operated said truck to the left of the center line of said highway, and so negligently, recklessly, and carelessly drove and operated said truck that the same was caused to, and did, strike and collide with said bus with such great force and violence that gasoline carried by said truck was caused to be sprayed over said bus and ignited, thereby causing said bus to burst into flames and to be demolished, and inflicting upon Plaintiff the severe and permanent injuries hereinafter set forth.

V.

That the injuries to Plaintiff, as hereinafter set forth, were proximately caused by and contributed to by the negligence of the Defendants, and each of them, in each and all of the acts of negligence hereinbefore set forth.

VI.

That by reason of the negligence of Defendants, and each of them, as aforesaid, Plaintiff was burned and injured in and [3] about his entire body; that he received multiple fractures of both of his lower extremities; that he sustained a severe laceration of his forehead and scalp; that his skull was fractured, crushed, and broken; that he sustained first and second degree burns on his face and arms; first,

second and third degree burns on both hands, and his arms and shoulders; that he sustained a severe shock to his nervous system; that he received a severe injury to his back and spine; that he received severe internal injuries; that Plaintiff's general health and well-being have been greatly injured and impaired; that all of said injuries caused Plaintiff great pain and suffering and will cause him great pain and suffering in the future; that Plaintiff is advised and believes that all of said injuries are permanent, and that he will always suffer therefrom, all to his general damage in the sum of Seventy Thousand (\$70,000.00) Dollars.

VII.

That because of said injuries and by reason of the negligence of the Defendants, and each of them, Plaintiff has been forced to incur, and in the future will incur, substantial expenses for medical and surgical treatment and advice, hospital care and attention, nursing services, X-rays and medicines, and other medical treatment to care for and relieve his said condition, all to Plaintiff's special damage in the sum of Fifteen Thousand (\$15,000.00) Dollars.

VIII.

That at the time of said accident, and previous thereto, Plaintiff was an able-bodied man, and could, and did, earn at his occupation as a bus driver, approximately the sum of Thirty-eight Hundred (\$3,800.00) Dollars per annum, but that by reason of being injured, as hereinbefore set forth, Plaintiff's earning capacity has been wholly lost and

destroyed up to the [4] present time, and his earning capacity in the future will be greatly diminished and impaired, if not altogether destroyed, all to Plaintiff's special damage in the sum of Eighty Thousand (\$80,000.00) Dollars.

Wherefore, Plaintiff prays judgment against Defendants, and each of them, in the sum of One Hundred Sixty-five Thousand & no/100 (\$165,000.00) Dollars, together with Plaintiff's costs and disbursements incurred herein.

Dated this 23rd day of September, 1947.

THOMAS C. COLTON,
Attorney-at-Law,

DAVIS, MICHEL, YAEGER &
McGINLEY,

By THOMAS C. COLTON,
Attorneys for Plaintiff.

State of Montana,
County of Yellowstone—ss.

Thomas C. Colton, being first duly sworn, on oath, deposes and says:

That he is one of the Attorneys for Plaintiff in the foregoing complaint; that he makes this verification for and on behalf of said plaintiff for the reasons that the plaintiff is not now within the County of Yellowstone, Montana, where affiant resides and where this verification is made; that he has read the foregoing complaint and knows the

contents thereof, and that the same is true to the best of his knowledge, information and belief.

THOMAS C. COLTON.

Subscribed and sworn to before me this 10th day of October, 1947.

[Seal] WILLIAM A. COMBS,
Notary Public for the State of Montana, Residing
at Billings, Montana.

My commission expires on April 1, 1949.

[Endorsed]: Filed U.S.D.C. December 15, [5]
1947.

[Title of District Court and Cause.]

NOTICE OF INTENTION TO FILE
PETITION FOR REMOVAL

To: Ernest B. Brownell, Plaintiff in the above-entitled cause, and to Thomas C. Colton and Davis, Michel, Yaeger & McGinley, Esquires, Attorneys for said Plaintiff:

You, and each of you, are hereby notified that Fred M. Manning, Inc., a corporation, one of the defendants in the above-entitled cause, intends to file and will file at the hour of 10:00 o'clock a.m. on the 15th day of November, 1947, in the above-entitled court in the above-entitled action, and immediately thereafter, or as soon as counsel can be heard, will present to said court the petition of said defendant Fred M. Manning, Inc., for the removal

of the above-entitled cause to the District Court of the United States for the District of Montana, and that at said time said defendant Fred M. Manning, Inc., will also present a good and sufficient ground on removal to the above-entitled court for its acceptance and approval in connection with said petition for removal as aforesaid, and will move said court for an order removing said cause to the District Court of the United States for the District of Montana.

Dated this 14th day of November, 1947.

COLEMAN, JAMESON &
LAMEY,

By CALE CROWLEY,
Attorneys for Fred M. Manning, Inc., One of Defendants.

Receipt of Copy acknowledged.

[Endorsed]: Filed U.S.D.C. December 15, [6]
1947.

[Title of District Court and Cause.]

PETITION FOR REMOVAL

The petition of Fred M. Manning, Inc., a corporation, one of the defendants in the above-entitled cause, respectfully shows:

I.

That petitioner is one of the defendants in the above-entitled cause; that said cause was commenced

by Ernest B. Brownell, plaintiff herein, by filing the complaint herein on or about October 10, 1947, and by serving summons and complaint thereafter on petitioner on or about Oct. 27, 1947, within Lewis and Clark County, Montana; that said cause is now pending in the above-entitled court; that your petitioner is informed and believes and therefore alleges that no service of summons and complaint has been effected upon the defendant Robert B. Hawkins.

II.

That the above-entitled cause is a suit of civil nature; that plaintiff seeks recovery from defendants of \$125,000.00 for damages allegedly sustained by plaintiff as a result of alleged negligence of defendants, all as more fully appears in plaintiff's complaint on file herein; that the matter and amount in dispute and controversy in said cause, and the amount of damages claimed therein, exceed the sum and value of Three Thousand Dollars, exclusive of interest and costs. [8]

III.

That your petitioner disputes plaintiff's claim and demand, and denies the same, and denies any and all liability with reference to the matters and things set forth and alleged in plaintiff's complaint, and denies that plaintiff is entitled to any judgment or relief against petitioner.

IV.

That the controversy in the above-entitled cause at the time of commencement thereof was, and at all times since has been, and now is, wholly between

citizens of different states; that at the time of the commencement of the above-entitled action plaintiff was, ever since has been, and now is, a resident and citizen of the State of Wyoming; that petitioner Fred M. Manning, Inc., and the defendant Robert B. Hawkins at the time of the commencement of said action were, ever since have been, and now are citizens and residents of the State of Oklahoma and non-residents of the State of Montana.

V.

That petitioner files and presents herewith a good and sufficient bond with good and sufficient surety as provided and required by the statutes of the United States in such cases, conditioned that it will enter and file in the District Court of the United States, for the District of Montana, within thirty days from the date of the filing of this petition for removal, a certified copy of the record in the above-entitled cause, and that it will pay all costs that may be awarded by the District Court of the United States, for the District of Montana, if said District Court shall hold that the above-entitled cause was wrongfully or improperly removed thereto.

VI.

That said cause has not been tried in the above-entitled court, and this petition is made and filed herein before petitioner is required by the laws of the State of Montana, or any rule or [9] rules of the above-entitled court, to answer or plead to the complaint of plaintiff herein; that your petitioner desires to remove this cause before the trial thereof

from the said State court to the United States District Court, in and for the District of Montana.

Wherefore, petitioner prays and moves this Honorable Court to accept this petition and the aforesaid bond on removal, and to proceed no further herein except to make the order of the removal of said cause required by law and to cause the record herein to be removed to the aforesaid District Court of the United States, in and for the District of Montana.

COLEMAN, JAMESON &
LAMEY,

By CALE CROWLEY,
Attorneys for Defendant,
Fred M. Manning, Inc.

State of Montana,
County of Yellowstone—ss.

Cale Crowley, being first duly sworn, deposes and says:

That he is one of the attorneys for the defendant Fred M. Manning, Inc., in the above-entitled cause; that he makes this verification for and on behalf of the said defendant for the reason that none of the officers of said defendant is now in Yellowstone County, Montana, where affiant resides and makes this affidavit; that he has read the foregoing petition for removal and knows the contents thereof, and that the matters and things therein stated are true to the best of his knowledge, information and belief.

CALE CROWLEY.

Subscribed and sworn to before me this 14th day of November, 1947.

[Seal] JAMES H. KILBOURNE,
Notary Public for the State of Montana, Residing
at Billings, Montana.

My commission expires December 8, 1947.

[Endorsed]: Filed U.S.D.C. December 15, [10]
1947.

[Title of District Court and Cause.]

BOND ON REMOVAL

Know All Men by These Presents: That Fred M. Manning, Inc., a corporation organized and existing under and by virtue of the laws of the State of Oklahoma, as principal, and Great American Indemnity Company, a corporation organized and existing under and by virtue of the laws of the State of New York, and duly authorized to do business in the State of Montana, as surety, are held and firmly bound unto Ernest B. Brownell, plaintiff in the above-entitled action, in the penal sum of Five Hundred Dollars (\$500.00) for the payment of which well and truly to be made to the said Ernest B. Brownell, plaintiff above named, the undersigned principal and surety bind themselves, their representatives, successors and assigns, jointly and severally, firmly by these presents.

Sealed with their seals and dated this 14th day of November, 1947.

The condition of this obligation is such that:

Whereas, the said Fred M. Manning, Inc., a corporation, one of the defendants in the above-entitled cause, is about to petition the above-entitled court for the removal of the above-entitled cause therein pending, in which Ernest B. Brownell is plaintiff, and said Fred M. Manning, Inc., is one of the defendants, to the District Court of the United States, for the District of Montana. [11]

Now, Therefore, if the said Fred M. Manning, Inc., shall enter and file in the District Court of the United States, for the District of Montana, within thirty days from the date of the filing of the aforesaid petition for removal, a certified copy of the record in the above-entitled action, and shall well and truly pay all costs that may be awarded by the aforesaid United States District Court if said United States District Court shall hold that such suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise to remain in full force and virtue.

In Witness Whereof, the undersigned principal and surety have caused these presents to be executed this 14th day of November, 1947.

[Seal] FRED M. MANNING., INC.,
By CALE CROWLEY,
One of Its Attorneys.

[Seal] GREAT AMERICAN
INDEMNITY COMPANY,
By A. L. LA BAR,
Its Attorney in Fact.

Service of the foregoing Petition and Bond and receipt of a true copy thereof acknowledged this 14th day of November, 1947.

THOMAS C. COLTON,
Attorney for Plaintiff.

[Endorsed]: Filed U.S.D.C., Dec. 15, 1947. [12]

[Title of District Court and Cause.]

ORDER ON REMOVAL

The defendant Fred M. Manning, Inc., having filed herein within the time provided by law its petition for removal of said action to the District Court of the United States for the District of Montana, and having at the same time offered a good and sufficient bond in the sum of Five Hundred Dollars with said petition, conditioned as by the acts of Congress provided, and it further appearing that notice of intention to file said petition for removal and bond on removal was served on said plaintiff Ernest B. Brownell, and his attorney, by the said defendant Fred M. Manning, Inc., prior to the filing of said petition and bond herein,

Now, Therefore, this court does hereby accept and approve the said bond, and accept said petition, and does hereby order that the said action be, and the same is, hereby removed for trial to the District Court of the United States for the District of Montana, pursuant to the statutes of the United

States, and that this court will proceed no further in said cause.

Done in open court this 15th day of November, 1947.

GUY C. DERRY,
Judge.

[Endorsed]: Filed U.S.D.C., Dec. 15, 1947. [13]

[Title of District Court and Cause.]

CERTIFICATE TO TRANSCRIPT

State of Montana,
County of Yellowstone—ss.

I, Katie Davies, as Clerk of the District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone, do hereby certify:

That I have compared the above and foregoing copies of complaint, notice of intention to file petition for removal, petition for removal, bond on removal and order on removal, in the above-entitled cause, with the originals thereof on file in my office as such Clerk of Court, and that the same are full, true and correct copies of such original files.

In Witness Whereof, I have hereunto set my hand and affixed the seal of my office this 9th day of December, 1947.

[Seal] KATIE DAVIES,
Clerk of District Court.

[Endorsed]: Filed U.S.D.C., Dec. 15, 1947. [14]

In the District Court of the United States for the
District of Montana, Billings Division

ERNEST B. BROWNELL,

Plaintiff,

vs.

FRED M. MANNING, INC., and ROBERT B.
HAWKINS,

Defendants.

ANSWER

Come now the defendant, Fred M. Manning, Inc., in the above-entitled action, and for its separate answer to plaintiff's complaint herein, admits, denies and alleges:

First Defense

I.

Deny that defendants owned and maintained a certain so-called flat bed semi-trailer truck; admit the remaining allegations of Paragraph I.

II.

Deny each and every allegation of Paragraph II.

III.

Admit the allegations of Paragraph III.

IV.

Admit that on December 27, 1946, at approximately 2:30 p.m. at a point approximately nine miles northerly from Worland, Wyoming, a Burlington bus driven by plaintiff in a general north-

erly direction collided with a truck driven in a southerly direction by defendant Robert B. Hawkins; deny each and every remaining allegation of Paragraph IV.

V.

Deny each and every and all allegations of Paragraph V.

VI.

Deny any knowledge or information sufficient to form a belief concerning the injuries, if any, and pain and suffering, if [15] any, which plaintiff alleges he sustained in said accident, and therefore deny the same; deny that plaintiff sustained general damages in the sum of \$70,000 or in any other sum by reason of any act or omission of the defendants or either of them; deny each and every and all remaining allegations of Paragraph VI.

VII.

Deny the allegations of Paragraph VII; deny that plaintiff sustained special damages in the sum of \$15,000 or in any other sum by reason of any act or omission on the part of defendants or either of them.

VIII.

Deny any knowledge or information sufficient to form a belief concerning the allegations of Paragraph VIII and therefore deny the same; deny that plaintiff sustained special damages in the sum of \$40,000 or in any other sum by reason of any act or omission on the part of the defendants or either of them.

Second Defense

I.

That at all times herein mentioned and particularly at the time and place of the accident which occurred on December 27, 1946, on U. S. Highway No. 20 at a point in Wyoming approximately 9 miles north of Worland, Wyoming, at the intersection of a dirt side road or farm road which crossed said U. S. Highway No. 20 in a general east and west direction and approximately at right angles thereto, there was a rise in said U. S. Highway No. 20 reaching a crest at a point approximately 500 feet north of the point of collision and of said intersection which prevented defendant's driver from seeing the point of collision and the approaching bus driven by the plaintiff at any point in excess of 500 feet northerly from the point of collision.

II.

That at all times herein mentioned and particularly at the time and place of the accident on December 27, 1946, described in plaintiff's complaint, there was a wooden bridge with banisters thereto set at an angle on an S curve just south of said intersection [16] of said U. S. Highway No. 20 and the dirt or farm road, which said wooden bridge carried traffic on U. S. Highway No. 20 and enabled it to cross a large drain ditch parallel with and southerly from the said intersecting dirt or farm road; and that because of said S curve and the angle at which said bridge was constructed on said highway with wooden banisters it had the ap-

pearance of being a narrow bridge to drivers approaching from the north, and so appeared to the driver of defendant's vehicle.

III.

That at all times herein mentioned, and particularly at the time and place of the accident on December 27, 1946, described in plaintiff's complaint, the said U. S. Highway No. 20 was covered with a very slippery coating of ice and packed snow for a distance of several miles south of Worland, Wyoming, to approximately 300 feet northerly from the point of collision involved in this accident; and that northerly on said U. S. Highway No. 20 and on U. S. Highway No. 310, intersecting therewith near Greybull, Wyoming, on the route and highway travelled by defendant to the scene of said accident for a distance of approximately 70 miles the said roadway and highway was clear of ice and packed snow, and that only a light patch here and there of snow was upon said highway at any point or place excepting only the last 300 feet northerly from the point of collision.

IV.

That the plaintiff, in travelling northerly on said U. S. Highway No. 20 from Thermopolis to the point of said collision, had travelled upon said extremely slippery and icy roadway, and knew or should have known that it was unsafe to drive his bus at a speed in excess of 20 to 30 miles per hour, and that in disregard thereof he drove said bus at a speed of approximately 35 to 40 miles per hour, and was so

driving it when the respective vehicles being driven by the plaintiff and the defendant Hawkins approached each other and came in view of each other immediately preceding said collision. [17]

V.

That to the south of the bridge on U. S. Highway No. 20 crossing said drain ditch at the intersection of the dirt roadway with said U. S. Highway No. 20 there were two turnouts, one approximately 100 feet south of said bridge and the other approximately 200 feet south of said bridge, both of which were travelable and the gates of which were down and open to traffic when passed by plaintiff immediately prior to said collision.

VI.

That the plaintiff was driving said Burlington Bus in a northly direction on said U. S. Highway No. 20 at a high and dangerous rate of speed when taking into consideration the extremely slippery and icy condition of the highway upon which he was then travelling at the time the defendant Robert B. Hawkins came over the rise in the highway to the north of said road intersection and said bridge. That the defendant Hawkins was then driving his truck and the trailer hitched thereto in a careful and prudent manner on his own right or west side of said highway; that he observed that the Burlington Bus being driven by the plaintiff was not slackening its speed and that it appeared to him that unless he applied his brakes and slackened his

speed his truck and trailer would meet the Burlington Bus being driven by the plaintiff upon said narrow bridge, and determining that it was prudent so to do he applied his brakes and slackened the speed of his truck in an attempt to avoid meeting the bus driven by the plaintiff on what appeared to be a narrow bridge, not then knowing of the icy and slippery condition then existing under the light covering of snow which appeared to be on said highway at said place. That the application of said brakes on defendant's truck and trailer pulled thereby caused the same to jackknife when said vehicles were each approximately 250 feet from said bridge; that the plaintiff observed that defendant's truck and trailer had jackknifed and that in spite of said observation plaintiff continued to approach said bridge and towards said [18] intersection at a high and dangerous rate of speed. That the defendant Hawkins endeavored to straighten out the defendant's truck and the trailer hitched thereto, but that because of the extremely icy and slippery condition of said highway, and through no fault or negligence of the defendant Hawkins, he was unable to do so; but that he did succeed in getting his truck and trailer either stopped or practically stopped north of said bridge and before being hit by the plaintiff's bus. That the plaintiff wholly failed to properly reduce his rate of speed and to get his bus under control and carelessly, negligently, and recklessly drove said bus into the left side of defendant's tractor at about the middle thereof,

bursting the gas tank on the left side thereof and causing the collision in question.

VII.

That said accident and collision were proximately caused or contributed to by plaintiff's own fault and carelessness as aforesaid in driving said bus at an unreasonable and excessive rate of speed while approaching the scene of said collision, in failing to have said bus under proper or sufficient control, in endeavoring to beat defendant to the crossing of said wooden bridge and in failing to stop his vehicle within a distance of 250 feet after knowing that defendant's truck was getting out of control, and in failing to drive his Burlington Bus off said highway into one of the two turnouts south of said wooden bridge.

GOPPERT AND HOUSEL,
COLEMAN, JAMESON &
LAMEY,

By CALE CROWLEY,
Attorneys for Defendant,
Fred M. Manning, Inc.

Receipt of copy acknowledged.

[Endorsed]: Filed U. S. D. C. April 1, [19] 1948.

[Title of District Court and Cause.]

OPINION OF THE COURT

This is a civil action for damages for personal injuries suffered by plaintiff in a collision between a bus of the Burlington Transportation Company of which he was the driver, and a truck and trailer of Fred M. Manning, Inc., defendant herein, of which the defendant Robert B. Hawkins was the driver, which occurred on U. S. Highway No. 20, about 9 miles north of Worland, Wyoming, on December 27th, 1946. The case was tried to the court without a jury, and was submitted for decision upon briefs of counsel for the respective parties.

The court has endeavored carefully to weigh the evidence relating to this tragedy which resulted fatally to seven persons from shock and fire caused by the collision. The bus carried eighteen passengers who were entrusted to the care of the plaintiff, who was the driver in charge. In either direction from the scene of the accident, which occurred on Highway No. 20 about ten feet north of a bridge over a drainage ditch, the highway was straight-away and the visibility was good and the drivers of both vehicles had a clear view of each other as they approached the bridge, and from the evidence it appears the thought that they might pass each other at or on the bridge was in the minds of both drivers; the heads of both drivers were at an elevation of about seven feet above the roadway so that each had a clear and unobstructed view.

The truck and trailer were going south and the

bus traveling north, and the roadway was covered with snow and ice; this condition prevailed all the way north from Worland to the bridge and beyond; there is conflict in the testimony as to the extent of [20] the snow and ice north of the bridge; the driver of the truck asserts that he suddenly and abruptly encountered snow and ice about 425 feet north of the bridge, but before he struck the icy condition he said he could see the snow on the bridge, and that when he reached the ice the truck and trailer began to swerve and skid and afterwards go out of control, and the trailer skidded across the road to the east side, but he said that he was gaining control and had the truck headed towards the west side—his side of travel—when the bus crossed the bridge and collided with the truck. Both drivers knew there was snow and ice and slippery conditions underneath their vehicles. The driver of the bus knew the conditions and had known them for a distance of 9 miles south of the bridge and also that care and caution would be required to insure the safety of his passengers, and he must have seen the threatening situation and the possible danger of a meeting on the bridge, especially when he observed the trouble the driver was having with his truck and trailer.

Both drivers had the duty of proceeding with reasonable care and caution. One driver had a heavy truck and trailer weighing about 38,000 pounds to control on snow and ice, while the other driver had a large bus weighing 21,600 pounds to control, also on snow and ice. It would seem that when such ve-

hicles—enormous in size and weight—are about to meet on a bridge when traveling over an icy, slippery highway that great care should be observed not only for the safety of the drivers themselves but for the protection of members of the public generally whose safety may be endangered. The driver of the truck should have seen and prepared himself and his equipment for conditions confronting him that might prove dangerous, and the driver of the bus should have seen and understood the situation facing the driver of the truck and trailer and should have come to a full stop before crossing the bridge; according to the evidence he could have stopped had he acted promptly upon appearances in full view, and it was his duty to do so and not risk the hazard of meeting the truck and trailer on the bridge—especially so when the driver of the truck was in trouble; both could see the danger ahead when they were [21] 800 to 1,000 feet apart, and should have slowed down and stopped; both were experienced drivers and familiar with highway No. 20, and could see the turn-outs and might have avoided the accident in that manner; but the handicap to control seems to have been the excessive speed at which both heavy vehicles were traveling over a dangerous highway. The violence of the impact is evidence of the speed both vehicles had been going before the accident; the serious injuries received by both drivers and the damage to both vehicles in the impact, and the shock and fatal injuries to some of the passengers are circumstances that disclose excessive speed and lack of proper control.

Experts testified that both vehicles were in good mechanical condition before the accident; that they had been thoroughly examined and checked for any defects and none were found, so that no good reason appears why those experienced drivers could not have kept them under control at a time when they saw danger ahead, and both vehicles were distant about three blocks from each other, and both machines and the brakes thereon were in good working order.

At or near the Sam Piel driveway Mr. Brownell said he was going about 35 miles an hour, and at the moment of impact about 15 miles. After the first swerve of the on-coming truck and trailer he said that he might have pulled off right at the Piel driveway, if he had realized that the other vehicle was going out of control, but would have been taking a chance of going into the drainage ditch; he estimated the speed of the Manning vehicle at 50 miles per hour; he said the roadway was all ice from Worland to scene of the accident—ice with snow on top; he said he was traveling about 35 miles an hour from Worland to scene of accident, at another time in testifying he estimated his speed at 35 to 40 miles an hour over the same course. Does it appear from the evidence that a proper outlook was maintained on the part of either driver, or that either seemed fully to appreciate existing conditions, not only when they came in full view of each other, but before that, when they knew they were traveling over a bed of ice and snow, and should have regulated their speed to conform to

conditions and thus be able to maintain proper control of their [22] heavy equipments in preparation for any emergency that might arise at any time in traveling over the public highway when road conditions are fraught with danger? It was plainly discernible from the appearance of both drivers on the witness stand that both were intelligent witnesses and the evidence shows that they were experienced drivers of heavy vehicles—such as are found in this case—over the public highways under all sorts of weather conditions, during long periods of service; it appears from the testimony of the drivers that the bus was going from 35 to 40 and the truck and trailer from 40 to 45 miles per hour when the drivers sighted each other and were then from 850 to 1,000 feet apart, or about three blocks.

The court is not accepting the evidence which would require a belief that there was a sudden, abrupt and unforeseen change from clear dry black top to snow and ice at the particular spot designated; the truck driver admits he saw the snow covered bridge, and disinterested witnesses who live there and travel the road frequently disclose by their testimony that no such condition existed at the time of the accident—and both drivers were admittedly aware that they should avoid a meeting at the bridge, which appeared to be narrow because of a slight angle to the roadway, and both failed to have their respective vehicles under proper control. The evidence shows that the bus was traveling at the rate of 30 miles an hour just before it reached the bridge and the collision occurred about

ten feet beyond the bridge which was about 20 feet long.

From the foregoing facts and enlightening circumstances the court feels obliged to conclude that the negligence of both drivers furnished a proximate cause of the collision of the two vehicles and the consequent damages, injuries and loss of life. After hearing the testimony of physicians and surgeons in respect to their services in behalf of the plaintiff there can be no question that he was severely injured in the collision, that the driver of the truck and trailer was also injured and thereafter hospitalized, and, furthermore, that several passengers in the bus lost their lives in the accident, all of which is to be deeply regretted, but these lamentable facts do not relieve the Judge of his serious [23] duty to determine the responsibility for this tragic occurrence by resolving the evidence and attending circumstances to the best of his judgment and ability, and for any error committed the learned members of the higher tribunal will readily find and apply the correct solution.

During the trial of this case counsel questioned witnesses as to their testimony given on the trial of civil causes the week before, arising out of the same accident; the cases referred to by counsel were entitled *Mary V. Hennessey*, as administratrix of the estates of *Lois Lorene Foster* and *Violet Mae Stotts*, deceased, against the *Burlington Transportation Company* and *Fred M. Manning, Inc.*, consisting of

four actions for damages which were consolidated for trial, and in which the court found for the plaintiff.

Where a skidding automobile leaves its side of the road and passes over the center of the highway and into the traffic lane of vehicles traveling in the opposite direction, and "such skidding results from negligent acts and omissions of the driver, he is not absolved from the consequences of breach of the rule, although it is not deliberate or intentional * * *." And it was further held in the same case: "Where its skidding results from his negligence, the doctrine of 'unavoidable accident' may not be invoked to exempt liability for the consequences. *Wallis v. Nauman*, 157 Pac. (2) 285, Wyo.; 259 Ky. 286, 82 S.W. (2) 364, 366. There seems to be no doubt that the speed of the two heavy vehicles over the icy road negligently contributed to the violence of the collision which caused the tragedy that followed. *Pacific Greyhound Lines v. Rume*, and *Pacific Greyhound Lines v. Rhodes*, 178 Fed. (2) 652, 9th Circuit.

From what has heretofore been stated it should plainly appear that in the opinion of the court the plaintiff has not sustained the allegations of the complaint by a preponderance of the evidence, and, furthermore, that he would not be entitled to recover because of his own contributory negligence which proximately caused the collision and injuries thereby sustained. Findings of fact and [24] conclusions of law may be submitted and form of

judgment. Each side to pay its own costs. Exceptions allowed plaintiff.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed April 22, 1950. [25]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial before the court, sitting without a jury, at Billings, Montana, on May 16, 17, 18 and 19, 1949, trial by jury having been waived by Stipulation of counsel in open court. Thomas C. Colton, Esq., and Messrs. Davis, Michel, Yaeger and McGinley, represented by Philip Lush, Esq., appeared for the plaintiffs, and Ernest J. Goppert, Esq., Jerry W. Housel, Esq., Karl F. Crass, Esq., and Messrs. Coleman, Jameson & Lamey, represented by W. J. Jameson, Esq., and James M. Haughey, Esq., appeared for the defendant, Fred M. Manning, Inc., no service having been made upon the defendant, Robert B. Hawkins. After the trial briefs were filed by the respective parties. The court having considered fully the evidence introduced at the trial on behalf of the respective parties, and the briefs filed by counsel, and now being fully advised in the premises, the court hereby makes the following findings of fact and conclusions of law:

Findings of Fact

I.

That at all times herein mentioned, the plaintiff in the above-entitled cause was a citizen of the State of Wyoming; that the defendant, Fred M. Manning, Inc., was a corporation duly organized and existing under the laws of the State of Oklahoma; and that the amount involved in this suit exceeds the sum of \$3,000.00, exclusive of interest and costs.

II.

That on December 27th, 1946, the plaintiff, Ernest B. Brownell, [26] was operating a bus of the Burlington Transportation Company, a common carrier for hire, in a northerly direction from the town of Worland, Wyoming, over U. S. Highway No. 20; that the defendant Robert B. Hawkins was operating a truck of the defendant Fred M. Manning, Inc., in a southerly direction on said highway; and that about 2:00 o'clock p.m. said vehicles collided at a point on said highway about nine miles north of Worland, Wyoming, about 10 feet north of a bridge on said highway over a drainage ditch.

III.

That the bus so operated by the plaintiff was a large bus weighing 21,600 pounds unladen, and was carrying 18 passengers and that the truck operated by the defendant was a heavy truck and trailer weighing about 38,000 pounds.

IV.

That the highway was straight-away and the visibility was good; that both drivers had a clear and unobstructed view of each other as they approached the bridge; that the heads of both drivers at the drive wheel of their respective vehicles were at an elevation of about 7 feet above the roadway; and that it appears from the evidence that the thought that they might pass each other at or on the bridge was in the minds of both drivers.

V.

That the roadway was covered with snow and ice all the way north from Worland to the bridge and beyond that both drivers knew there was snow and ice and slippery conditions underneath their vehicles; and that plaintiff had known these conditions for a distance of nine miles south of the bridge.

VI.

That both drivers could see the danger ahead when 850 to 1,000 feet apart and both should have slowed down and stopped before colliding with each other; that both drivers were familiar with highway No. 20 and could see turnouts thereon and could have avoided the collision by using [27] them.

VII.

That both drivers were admittedly aware that they should avoid a meeting on the bridge, which appeared to be narrow because of a slight angle with the roadway; that both drivers failed to have

their respective vehicles under proper control; that the truck and trailer operated by the defendant Hawkins began to swerve and skid and afterwards went out of control, and the trailer skidded across the road to the east side, where the truck and bus collided about ten feet north of the bridge; and that plaintiff must have seen the threatening situation and the possible danger of meeting on the bridge, especially when he observed the trouble defendant Hawkins was having with his truck and trailer.

VIII.

That both vehicles were in good mechanical condition before the accident; that they had been recently examined and checked thoroughly for any defects and none were found; that the brakes thereon were in good working order; and that the respective drivers could have kept their vehicles under control at the time when they saw danger ahead and were about three blocks distant from each other.

IX.

That the driver of defendant's truck should have seen and prepared himself and his equipment for conditions confronting him that proved dangerous, and the plaintiff should have seen and understood the situation facing the driver of the truck and trailer and should have come to a full stop before crossing the bridge, and could have done so had he acted promptly upon appearances in full view; and that it was his duty to do so and not risk the hazard of meeting the truck and trailer on the

bridge after he had seen the driver of the truck was in trouble.

X.

That the bus driven by plaintiff was traveling from 35 to 40 miles an hour and the truck and trailer driven by the defendant Hawkins was traveling from 40 to 50 miles an hour when the drivers sighted each other and were 850 to 1,000 feet, or about 3 blocks, apart; that the bus was traveling at the rate of [28] 30 miles an hour just before it reached the bridge and the collision occurred about 10 feet beyond the bridge, which was about 20 feet long; that both vehicles were traveling at an excessive rate of speed in view of the icy and dangerous condition of the highway, and the impact of the collision of the two vehicles was violent.

XI.

That plaintiff did not exercise ordinary care on his part in the following particulars:

(a) While approaching the point of collision plaintiff did not have the bus he was driving under proper control and drove the same without due caution and at an excessive rate of speed in view of the hazards which existed by reason of the slippery condition of the highway.

(b) Plaintiff did not maintain a proper lookout when approaching the point of collision, when had he looked he could have observed defendants' truck out of control on the highway and could have stopped the bus he was driving and avoided said collision.

(c) Plaintiff failed to slow down or slacken the speed of the bus he was driving and bring the same under proper control when the approaching truck of the defendant was in plain sight and it appeared likely the vehicles would meet at or near said bridge.

XII.

That the negligence of the plaintiff and the defendant Hawkins in the particulars hereinabove set forth was the proximate cause of the collision of the two vehicles, and the consequent injuries suffered by the plaintiff and the defendant Hawkins.

XIII.

That plaintiff's own contributory negligence proximately caused the collision, and injuries thereby sustained.

XIV.

That plaintiff has failed to sustain the material allegations [29] of his complaint by a preponderance of the evidence.

Conclusions of Law

From the foregoing Findings of Fact, the court makes the following Conclusions of Law.

I.

That this court has jurisdiction of the above-entitled action.

II.

That the negligent acts and omissions of the plaintiff and the defendant Robert B. Hawkins

were the proximate cause of the collision of the two vehicles and the consequent injuries suffered by the plaintiff.

III.

That plaintiff is not entitled to recover from the defendant, Fred M. Manning, Inc., because his own contributory negligence proximately caused the collision and the injuries thereby sustained.

Let the judgment of this court be entered in accordance with these findings and conclusions.

Done this 1st day of May, 1950, by the court.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed May 1, 1950. [30]

In the District Court of the United States for the
District of Montana, Billings Division

Case No. 1043

ERNEST B. BROWNELL,

Plaintiff,

vs.

FRED M. MANNING, INC., and ROBERT B.
HAWKINS,

Defendants.

JUDGMENT

Be It Remembered that the above-entitled cause came on regularly for trial in the above-entitled court at Billings, Montana on May 16, 1949. The plaintiff was represented by his attorneys, Thomas C. Colton, Esq., and Philip Lush, Esq., and the

defendant, Fred M. Manning, Inc., was represented by its attorneys, Ernest J. Goppert, Esq., Jerry W. Housel, Esq., W. J. Jameson, Esq., and James M. Haughey, Esq. The defendant, Robert B. Hawkins, had not been served and did not appear as a party defendant, at said trial.

A trial by jury having been expressly waived by the respective parties the cause was tried before the court sitting without a jury; whereupon witnesses on the part of the plaintiff and defendant were duly sworn and examined and documentary evidence and exhibits were introduced in evidence by the respective parties; the evidence being closed the cause was submitted to the court for consideration and decision, after briefs filed by the respective parties. The court having heard the testimony and having examined the proofs offered by the respective parties and having considered the briefs and arguments of counsel, now being fully advised in the premises and having filed herein its Findings of Fact and Conclusions of Law, and having directed that judgment be entered in accordance therewith,

Now, Therefore, by reason of the law and findings aforesaid, It Is Hereby Ordered, Adjudged and Decreed that the plaintiff have and recover nothing from the defendant, and that each side pay its own costs.

Done this 1st day of May, 1950.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed and entered May 1, 1950. [31]

[Title of District Court and Cause.]

NOTICE OF MOTION

To the Above-Named Defendant, Fred M. Manning, Inc. and to Its Attorneys, Ernest J. Goppert, Esq., Jerry W. Housel, Esq., Karl F. Crass, Esq., and Messrs. Coleman, Jameson & Lamey:

You, and Each of You, Will Please Take Notice that at a special term of the above-named court to be held at Billings, Montana, on the day of May, 1950, at ten o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, the Plaintiff will move the court for an order amending the findings of fact herein, dated May 1, 1950, as follows:

1. By adding the following finding of fact: "That the truck operated by the Defendant skidded from its side of the road and passed over the center of the highway and into the traffic lane of the bus being operated by the Plaintiff; that such skidding resulted from the negligent acts and omissions of the Defendant's driver, Robert B. Hawkins; that such negligence of the Defendant was the sole proximate cause of the resulting collision between the truck operated by the Defendant and the bus operated by the Plaintiff."

2. By adding a finding of fact setting forth the amount of the damage occasioned to the Plaintiff in said collision.

3. By otherwise amending the findings of fact

and conclusions of law and the judgment entered herein so as to conform with the proposed amended findings of fact above set forth. [32]

Said motion will be made upon all the files, records, and proceedings herein and upon the following grounds:

1. That the findings of fact and conclusions of law are contrary to and not justified by the evidence adduced upon the trial herein;

2. That the findings of fact and conclusions of law are contrary to law;

3. That the proposed amendments to said findings of fact and conclusions of law are necessary to conform the same to the evidence adduced upon the trial herein and to the law applicable thereto.

You, and Each of You, Will Further Please Take Notice that at said time and place aforesaid, in the event that the foregoing motion for amended findings of fact and conclusions of law and judgment is denied, the Plaintiff will move the court for an order vacating and setting aside said findings of fact and conclusions of law and vacating and setting aside the judgment herein, and granting to Plaintiff a new trial in this action.

Said motion will be made upon all the files, records, and proceedings herein and upon the following grounds:

1. That the findings of fact are contrary to and not justified by the evidence adduced upon the trial herein;

2. That the findings of fact are contrary to law;

3. That the conclusions of law are contrary to the evidence adduced upon the trial of the above-entitled action and are not sustained thereby and are contrary to law; and

4. That the interests of justice require a new trial.

Dated this 9th day of May, 1950.

/s/ THOMAS C. COLTON,

DAVIS MICHEL YAEGER &
McGINLEY,

Attorneys for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 11, 1950. [33]

[Title of District Court and Cause.]

OPINION AND ORDER DENYING MOTION
TO AMEND FINDINGS OF FACT

Plaintiff's motion for amended findings or for new trial came on regularly for hearing on oral argument and on briefs submitted by counsel for the respective parties, all of which were presented to the court in an able manner and with an exhaustive discussion of the fact situation and review of many of the law points heretofore submitted.

The court has endeavored carefully to consider

the facts, authorities, and arguments presented, which was also done by the court after the trial on the merits. As was stated in the ruling on the motions for new trial in the Hennessey cases, relating to the same accident, the court has been unable to find any new matter of sufficient importance to cast doubt on the correctness of the decision, findings and conclusions heretofore rendered in said cause. Whether the court is correct in so holding will not be known until a review can be had by higher authority. As the court understands the facts and law deemed applicable, to grant a new trial would unnecessarily delay proceedings and postpone to an unreasonable extent the final outcome of the case. In view of the foregoing situation, being duly advised, and good cause appearing therefor, the court is of the opinion that the said motion should be denied, and such is the ruling of the court herein. Exceptions allowed counsel.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed December 15, 1950. [35]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Ernest B. Brownell, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the judgment entered in the foregoing action on the 1st day of May, 1950, that the plaintiff have and recover nothing from the defendant Fred M. Manning, Inc.

Dated this 10th day of January, 1951.

THOMAS C. COLTON,

DAVIS, MICHEL, YAEGER &
McGINLEY,

By SIDNEY S. FEINBERG,
Attorneys for Plaintiff.

SIDNEY S. FEINBERG,
Minneapolis, Minnesota,
Of Counsel.

[Endorsed]: Filed January 11, 1951. [36]

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men by These Presents: That we, Ernest B. Brownell, as principal, and Maryland Casualty Company, as surety, are held and firmly bound unto Fred M. Manning, Inc., in the above-

entitled action in the sum of Two Hundred Fifty Dollars (\$250.00), lawful money of the United States, to be paid unto the said Fred M. Manning, Inc., its successors or assigns, for which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators, assigns and successors, firmly by these presents.

The condition of this obligation is such that, whereas, the said Ernest B. Brownell appeals to the United States Court of Appeals for the Ninth Circuit from the judgment entered in this action on the 1st day of May, 1950.

Now, Therefore, if the said Ernest B. Brownell shall make payment of costs if the appeal is dismissed or the judgment affirmed or of such costs as the Appellate Court may award if the judgment is modified, then this obligation shall be void, otherwise of force.

ERNEST B. BROWNELL,

By PHILIP B. LUSH,

His Attorney-in-Fact.

[Seal]

MARYLAND CASUALTY
COMPANY,

By E. G. DAVIS, JR.,

Its Attorney-in-Fact.

In presence of:

A. PAYTAS,

A. HAGGENMILLER.

[Endorsed]: Filed January 11, 1951. [38]

[Title of District Court and Cause.]

POINTS RELIED ON FOR REVERSAL

Plaintiff-appellant will rely upon the following points for reversal of the decree and final judgment of the trial court:

1. That the trial court erred in its decision and the findings of fact, conclusions of law and order for judgment entered thereon and that the trial court erred in its denial of the motion of plaintiff to amend said findings of fact and conclusions of law or for a new trial for the following reasons:

(a) That the evidence does not sustain the finding that plaintiff was guilty of any negligence.

(b) That if the evidence does sustain the finding that plaintiff was guilty of any negligence it appears, as a matter of law, that any such negligence was not a proximate or contributing cause of the accident and the injuries sustained by plaintiff.

Dated this 9th day of February, 1951.

THOMAS C. COLTON,

DAVIS, MICHEL, YAEGER &
McGINLEY,

By SIDNEY S. FEINBERG,
Attorneys for Plaintiff.

SIDNEY S. FEINBERG,
Of Counsel.

[Endorsed]: Filed February 12, 1951. [40]

In the District Court of the United States, in and
for the District of Montana, Billings Division

Civil Action No. 1043

ERNEST B. BROWNELL,

Plaintiff,

vs.

FRED M. MANNING, INC., et al.,

Defendant.

Before: Honorable Charles N. Pray,
United States District Judge, Without a
Jury, at Billings, Montana, on May 16th,
17th, 18th and 19th, 1949.

TRANSCRIPT OF TRIAL

APPEARANCES

For Plaintiff:

MR. THOMAS C. COLTON,

Attorney at Law,

Billings, Montana.

DAVIS, MICHEL, YAEGER & MCGINLEY,

160 Baker Building,

Minneapolis, Minnesota, by

MR. PHILIP LUSH.

For Defendant:

COLEMAN, JAMESON & LAMEY, by
MR. WILLIAM JAMESON, and
MR. JAMES HAUGHEY,

Attorneys at Law,
Billings, Montana.

MR. ERNEST J. GOPPERT, and
MR. JERRY HOUSEL,

Attorneys at Law,
Cody, Wyoming.

MR. KARL F. CRASS,
Attorney at Law,
Denver, Colorado. [45]

Be It Remembered, That the above-entitled cause came on regularly for hearing in the United States District Court in and for the District of Montana, Billings Division, in the Federal Building, at Billings, Montana, on May 16th, 17th, 18th, and 19th, 1949, before the Honorable Charles N. Pray, sitting without a jury.

Whereupon, the following proceedings were had and done, to wit:

The Court: Gentlemen, we have a case set for trial, No. 1043, Earnest B. Brownell vs. Fred M. Manning, Inc., and others. I believe there was a verbal understanding that this case would be tried before the court without a jury; have you entered

into any stipulation to that effect, and filed it of record, Mr. Colton?

Mr. Colton: The trial may proceed without a jury, your Honor. We didn't ask for any jury.

The Court: I understood some of you told me verbally you wanted to try it without a jury?

Mr. Colton: Yes.

The Court: And now I am inquiring whether you have entered into a stipulation to that effect and filed it in the record so we will have something to refer to later on.

Mr. Jameson: If the court please, I don't believe there has been a stipulation. May the record show now the two parties stipulated the case may be tried then without a jury [50] before the court.

The Court: Very well.

Mr. Colton: At this time, your Honor, I move the admission of Philip C. Lush, who is admitted to practice in all the courts of his State, both State and Federal, and of the firm of Davis, Michel, Yaeger and McGinley, 160 Baker Building, Minneapolis, Minnesota.

Mr. Jameson: And may it please the court at the same time I move the admission of Karl F. Crass, of the Bar of Colorado, who has been admitted to the Federal and State Courts of Colorado.

The Court: Very well, you gentlemen may all be admitted here for the purposes of this suit.

Mr. Jameson: If the court please, I am not sure whether Mr. Goppert's admission will include this

case; if not, I move the admission of Mr. Goppert.

The Court: We will admit Mr. Goppert.

The Court: Now, gentlemen, do you desire to make a brief statement on the part of each side before we proceed to take testimony?

Mr. Jameson: May it please the court, before proceeding with the statements we would like to have an amendment to our answer by interlineation, and that is I now move the court that in the defendant's answer the following be substituted for lines 12 to 14, inclusive, on page 1. Comes now [51] the defendant Fred M. Manning, Inc., defendant in the above-entitled action, and for its separate answer to plaintiff's complaint herein, admits, denies and alleges. And also on page 6 in line 8 that the words "defendant Fred M. Manning, Inc.," be substituted for the word "defendants." In explanation of that when I made that by inadvertence we appeared for the other defendant, Mr. Hawkins. He wasn't served in this action and in all of the preliminary papers, the removal to this court and all other papers, we appeared only for the defendant Manning, but when the answer was filed through mistake we appeared for both the defendants rather than for the one defendant.

Mr. Colton: We have no objection to the amendment, your Honor.

The Court: Very well, the amendment will be made accordingly.

Mr. Lush: If the court please, I would like to have an amendment to plaintiff's complaint in this action; paragraph 8 of said complaint on page 4,

the last page of the complaint, substituting for the words "Forty Thousand Dollars" the words "Eighty Thousand Dollars," your Honor, for loss of wages suffered by the plaintiff in the future.

The Court: Any objection?

Mr. Goppert: If the court please, we want to object to that. [52]

The Court: I suppose the prayer says \$80,000?

Mr. Goppert: No, the prayer says one hundred twenty-five and that amendment would make it one hundred sixty-five.

Mr. Lush: If the court please, we will be able to show loss of wages of the plaintiff in the future of approximately \$80,000.

The Court: No objection? You haven't made any objection, have you?

Mr. Goppert: We want to object to that, your Honor, at this time.

The Court: All right, the amendment may be made accordingly. You may proceed, gentlemen.

Mr. Lush: If the court please, this action arises out of a collision between a truck and trailer combination owned and operated by the Fred M. Manning Company through their driver and servant, Hawkins, and a Burlington Trailways Bus on Highway 20 nine miles north of Worland. The plaintiff has alleged and will show that at all times the driver of the bus, Brownell, the plaintiff herein, was operating his bus with due care and as a careful, prudent man should operate a bus at that time and under those circumstances.

Plaintiff will further show that the defendant

through its agent and servant, Hawkins, operated the truck and trailer combination, or tractor-trailer combination, in a careless, reckless and negligent manner. The evidence will [53] show, your Honor, that the defendant's truck on approaching a point about nine miles north of Worland began to skid on a slippery icy road, straightened up, skidded again, and then straightened up, and skidded a third time across the highway and into the path of the oncoming bus.

There will be evidence, your Honor, to show that the highway north of the scene of the accident for a period of several miles was covered with ice and snow. There will also, I believe, be contrary testimony. I only bring that point up, your Honor, because the plaintiff does not feel that it is incumbent upon him in proving this case to prove conclusively that that highway was icy, nor does he depend upon the icy condition of the highway nor weather as a part of his case. There will also be evidence to the effect that the brakes on the trailer were either defective or inoperative. Again plaintiff only brings up this matter because he believes there will be contrary evidence and because he believes that his case does not depend, does not stand or fall upon whether or not the brakes of the trailer were operative or inoperative; whether the brakes were operative or inoperative, whether the highway or scene of the accident was icy or not icy, the defendant through its agent and servant, Hawkins, drove his truck in such a careless, reckless and negligent manner that it was

caused to run into and did strike the bus driven by the plaintiff Brownell. In this accident Brownell was severely damaged; he [54] was severely and permanently injured; he will never be able to work again at any field that he is familiar with or any field he is trained in. He has permanently lost the use of his left leg, and he is seriously crippled in the use of his right leg. He has lost very much the use of his hands. He suffered a fracture of the skull. He suffered severe bruises, burns and others. We are going to ask the court in this case to give us a very substantial verdict, the type of verdict that will recompense this man for all the pain and suffering he has gone through, for all the wages he has lost, and for all that he will suffer in the future, not only the loss like for medical expenses and entertainment for this man but more or less damaging losses that will come to him because he is totally and permanently disabled and crippled. Thank you.

Mr. Goppert: If the court please, gentlemen, the evidence of the defendant in this case will confirm that there was a terrible accident that took place about nine miles north of Worland on the afternoon of December 27th, 1946. It will show that a truck that was operated by Mr. Robert B. Hawkins for the Manning Company, which was a semi-trailer outfit, was headed southward on that highway being driven by Robert B. Hawkins, collided with a Burlington bus, which was headed northward on the same highway, the bus having approximately 22 passengers, and that they came

to a place of meeting at approximately a bridge that crosses an irrigation or drain [55] ditch that goes across this highway in an east and west direction, the highway itself generally being north and south at the scene of the accident. The plaintiff will be the driver of the Burlington bus. It will show that this Burlington bus was being driven by the plaintiff entirely in his charge and control at a speed of approximately 40 miles per hour. I believe the evidence will show that that was too fast a speed on the very icy snow-covered roadway that he had been traveling from Thermopolis, Wyoming, to the scene of the accident, and that the stopping distance of his vehicle at the speed he was going on that roadway would be from four to five hundred feet. The evidence will show that the truck operated by the defendant or on behalf of the defendant by Mr. Hawkins was a new West Coast Special truck on its maiden trip, as it were, equipped with good brakes that had been tested at the—both the truck and the trailer had been tested as to connections and brakes at the garage of the defendant company in Casper, Wyoming, about three days before this accident. The last test by the Wyoming State Highway Patrol on a stopping test at a point approximately two miles north of Basin, Wyoming, about thirty minutes or forty minutes before the accident, being at a point about 20 miles north of this collision, and the evidence will be that the brakes were then in good working order.

Our evidence will show that the road which was

traveled by Mr. Hawkins and the Manning equipment up to a point [56] five or six hundred feet north of this point of meeting was free of any dangerous hazards such as ice or snow, and that a person coming into the same from the north as the driver of the Manning truck approached didn't have any warning or notice of bad road conditions in front of him, and that he came on to the scene of this accident without the knowledge that there was ice or snow on that highway that would present any hazard or danger to him. And it will show that when the bus and the truck reached a point approximately 450 feet each from this bridge that the trucker believed, the truck driver believed it would be more safe not to pass on this bridge, and observing as he did it seemed that they would meet and pass on the bridge if he didn't slacken his speed—I should have said he was driving approximately 35 miles per hour with a bus that had a regulator or governor on it that controlled its speed to under 45 miles per hour—it will show that he then applied the hand brake that controlled the airbrake on the trailer, and observing that the trailer didn't slacken his speed as much as he believed it should he then discovered he was on snow covered ice and believed that he should use more brakes to endeavor to stop his equipment in order to prevent the meeting on this bridge he applied then the footbrake, which the evidence will show was connected to both the truck and trailer, and that he did it in the accepted and approved method of attempting to control vehicles that are on [57]

ice, which is tapping on the power as it is called, and some of them may call it fanning of the brake. And it will show that he had considerably slackened his speed until he came to a place that was apparently a rough spot in the road when the tractor portion of his outfit went out of control and skidded toward the southeast. And the evidence will show that it skidded—he thought it was going to go over in the barrow pit on the east side of the highway but before he reached that point the bus had crossed the bridge and was then approximately on him, hit his tractor, which was then turned toward the northeast and the front end towards the southwest and skidding across the road sideways. It will show that the bus in the left front corner of it hit approximately the middle of the left side of the tractor, and as unfortunate circumstances would make it, it hit the gas tank of that vehicle. These West Coast Specials being equipped with side tanks, one on each side that extend from approximately the rear end of the cab to the back wheel. And it will disclose that a fire happened afterwards. It will show that the trucker had released his throttle when he put his foot on the brake, and it will show that he did everything that he knew to prevent that accident. I believe after the court has heard all the evidence you will come to the conclusion that the accident itself was an unavoidable accident, one that happened in spite of everything that the defendant could do or could reasonably [58] be expected to do to prevent such an accident.

The Court: Call your first witness.

Mr. Lush: I will call Earnest B. Brownell.

EARNEST BYRON BROWNELL

plaintiff, was called as a witness, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lush:

Q. Will you state your full name, please?

A. Earnest Byron Brownell.

Q. Where do you live, Mr. Brownell?

A. 1020 Big Horn, Worland, Wyoming.

Q. And what is your age?

A. Thirty-seven.

Q. And what was your age on the date of this accident?

A. Thirty-five.

Q. Are you married, Mr. Brownell?

A. Yes.

Q. And do you have any children?

A. One daughter.

Q. And how old is that daughter?

A. Five, six years old.

Q. What was your occupation immediately prior to the happening of this accident, Mr. Brownell?

A. Bus driver.

Q. And for whom did you drive? [59]

A. Burlington Trailways.

Q. How long had you driven for the Burlington Trailways?

A. Three years and three months.

(Testimony of Earnest Byron Brownell.)

Q. And had you always held the run that you were working on on that particular day?

A. No.

Q. When had you started working on that particular run? A. The 15th of December.

Q. Now on the day of this accident in the afternoon were you driving your bus in a northerly direction out of Worland? A. Yes.

Q. And on what highway is that?

A. That is Highway 20.

Q. U. S. 20? A. That is right.

Q. And as you approached the scene of the accident did you observe another vehicle coming at you from the north, coming toward you from the north? A. Yes.

Q. Now when did you first start to pay attention to this other vehicle?

A. As I was almost to the Sam Piel driveway.

The Court: Have you accepted that map?

Mr. Lush: We have stipulated to it, your Honor.

Mr. Goppert: To put the preliminary in, don't you think we better stipulate on these: It is hereby stipulated between the parties hereto that the map and plat marked Plaintiff's Exhibit 1 is a map drawn to scale of one inch equals one [60] hundred feet, showing the objects that are listed thereon, and that each and every object listed thereon is shown in its proper place as determined by a survey, and that the upper half is a cross-section of the map showing the grade of the highway, which is located on the lower half of the same

(Testimony of Earnest Byron Brownell.)

exhibit, and that the grades appear by percentage on the upper portion, and that the other objects shown on the upper portion such as the culvert and the drain ditch and bridge banister are likewise drawn to the scale, the up and down scale being one inch equals ten feet, and the horizontal scale being the same as on the other portion of the map, one inch equals one hundred feet. The north direction is shown by a conventional sign on the map.

The Court: North is to the right?

Mr. Lush: To the right, yes, your Honor.

Mr. Lush: I think we also stipulated on that telephone pole.

Mr. Goppert: And it is stipulated that the telephone post marked telephone pole in the northwest corner of section nine was not in place at the time of the accident; it has been placed there since. That is all the stipulating at this time, if the court please, unless they would want something else stipulated.

The Court: Anything to add to it or is that satisfactory?

Mr. Lush: I think that covers it, your [61] Honor.

Mr. Goppert: If it would be more convenient to the court, we have another copy the court could use if he wishes.

The Court: I will see how it goes. That is a pretty good map.

Q. (By Mr. Lush): Mr. Brownell, will you

(Testimony of Earnest Byron Brownell.)

point out here on that map the Sam Piel driveway approach that you mentioned?

A. (Indicating.)

Q. And as you approached the Sam Piel driveway can you point out on that map approximately where the other vehicle was that you saw approaching you?

A. Right there.

The Court: What point is that?

Mr. Lush: That is a point that is shown as an irrigation lateral on the map.

Q. And is the Sam Piel driveway the first driveway from the south that is on the south side of the road? Coming from the south on the east side of the road that appears on the map?

A. Yes, that is right.

The Court: You mean coming from the south that driveway would be on the west side, wouldn't it?

Mr. Lush: No, your Honor, if he was headed north on his right would be the east.

The Court: The other side would be the west. Oh, you are pointing to that one.

Mr. Lush: He is pointing to this one here. [62]

Q. Will you mark on the map with the letter "A" the Sam Piel driveway, please? And will you mark with the letter "B" the point at which you stated you first saw or you first paid attention to the vehicle approaching from the opposite direction?

Mr. Lush: That is the irrigation lateral.

Q. Does that map show how far south of the

(Testimony of Earnest Byron Brownell.)

center of the drainage ditch that the center of the Sam Piel driveway is located?

A. Yes, that is 165 feet.

Q. And does that map show the distance from the center of the irrigation ditch to the center of the Martin Lamb driveway?

A. Yes, that is 250 feet.

Q. Will you mark with the letter "C" the Martin Lamb driveway? A. (Marking.)

Q. And how far north of the Martin Lamb driveway is the spot that you have indicated where you first started to pay attention to the other vehicle?

A. That is 40 feet according to this.

Q. I don't believe it actually shows on the map. You will have to estimate the distance, Mr. Brownell, unless we can determine it from the cross section up there.

A. Could I have that again please?

Q. Can you estimate—pardon me—

Mr. Lush: Do these correspond point for point, Mr. Goppert?

Mr. Goppert: Yes. [63]

Mr. Lush: They do correspond point for point? Now from an examination of this and we stipulated it is practically 425 feet from the north end of the bridge?

Mr. Goppert: 425.

Mr. Lush: We have stipulated it is approximately 425 feet from the north edge of the bridge to the high point of the road which was the irrigation lateral, your Honor.

(Testimony of Earnest Byron Brownell.)

The Court: Where he first noticed the approaching vehicle.

Mr. Lush: Where he first paid particular attention to it, your Honor, yes.

Q. When you first observed the vehicle approaching from the other direction when you first started to pay attention to it what called your attention particularly to it?

A. His trailer jogging out into the highway into my lane of highway.

Q. And when you observed the trailer jogging out into the highway, I believe you said, what did you do?

A. I applied the brakes at that time.

Q. And what was the next movement that was made by the approaching vehicle?

A. It straightened back up on to his side of the highway.

Q. And did you continue to apply your brakes or did you release your brakes?

A. I kept continuing to apply them. [64]

Q. And what was the next movement that was made by the vehicle that was approaching you?

A. It made another jog out into my side of the highway.

Q. And will you point out to the court at approximately at what spot it made the second jog out into the highway?

A. I would say about at the Lamb driveway.

Q. And what was the next move that was made by the approaching vehicle?

(Testimony of Earnest Byron Brownell.)

A. It straightened back up almost and then went into another jog and it never came out of it.

The Court: Went into another what?

A. Maybe I should say skid, your Honor.

Q. (By Mr. Lush): And was that the third skid that you observed that vehicle making?

A. Yes.

Q. And when he, when the third skid was made by the approaching vehicle in what direction or what path did the vehicles that were approaching you follow?

A. Southeasterly direction.

Q. And did they cross the center lane of the road? A. Yes.

Q. And did they ever go on to their own side of the road or on to the west side of the road?

A. No.

Q. Where were you with your bus when you first, when the approaching vehicle, the Manning truck went into the third [65] skid that you mentioned? A. The third skid?

Q. Yes, the last one?

A. I was about 10 feet south of the bridge.

Q. And what did you do with your vehicle at that time, if anything?

A. Well there was only one thing I could do, go across the bridge. I couldn't drive into the barrow pit because I would end up in that drainage ditch so I went on across the bridge and tried to get out on the highway on the right side on my side of the road.

(Testimony of Earnest Byron Brownell.)

Q. And as you, when you approached the north side of the bridge did you do anything particularly then?

A. Nothing except try to get as close to that rail as I could without——

Q. And after you passed the north rail of the bridge did you do anything with your vehicle then?

A. Just before the impact I gave it as much a swerve to the right as I could.

Q. And you did not succeed in avoiding the other vehicle I take it? A. No. That is right.

Q. How far north of the north edge of the bridge did the impact occur?

A. I would estimate about 10 feet.

Q. And at the moment of impact in what direction was your vehicle heading?

A. In a northeasterly direction. [66]

Q. What part of the bus came in contact with the Manning vehicle?

A. The left front corner.

Q. And what part of the Manning vehicle came in contact with the left front corner of the bus?

A. It was about the center of the truck. It was behind the cab and in front of the rear wheels.

Q. What was the condition of the bus you were driving?

A. It was in excellent condition.

Q. Do you have any idea how old the bus was?

A. About two months.

Q. Do you have any idea of what mileage there was on the bus at the time?

(Testimony of Earnest Byron Brownell.)

A. I am afraid I couldn't say on that.

Q. And was there any time from the time that you first saw the Hawkins vehicle skid, the Manning vehicle skid until the time of the impact was there any time in there when you released your brakes?

A. Well not—I didn't exactly release them. I did vary the pressure to try to keep those wheels just turning.

Q. And what part of the road did you drive the bus on from the Sam Piel driveway to the point of the impact?

A. On the extreme eastern edge.

Q. Did your vehicle skid at all?

A. No, sir.

Q. And why did you drive your vehicle on the extreme [67] right edge of the road?

A. Well I wanted to give the other truck a chance to get by me, and also along the edge of the road there is generally some deep snow that hasn't been packed down and it helps you to slow up.

Q. Now what speed did you drive your bus from Worland to the scene of the accident?

A. About 35 miles an hour.

Q. And what was your speed, your best estimate of your speed at the time that you first paid particular attention to the oncoming vehicle; in other words, when you were at or near Sam Piel's driveway? A. About 35.

Q. And what was the, what is your estimate of

(Testimony of Earnest Byron Brownell.)

the speed of your vehicle at the moment of impact? A. About 15.

Q. Now after the impact, Mr. Brownell, did you get out of the bus? A. Yes.

Q. From the time that the Manning vehicle started into its third skid, which was as I understand your testimony the last skid that it took, until the time of the impact will you describe what the position of the tractor was and the trailer of the Manning vehicle on the road?

A. The trailer came across the road first and when the trailer struck the east side of the road or the shoulder then the tractor came across. I would say the wheels of the trailer struck the shoulder of the east side of the road about 75 feet [68] north of the bridge.

Q. And what was the position of the tractor part of the outfit on the road as it came down the road toward you? A. It was crosswise.

Q. And what portion of the road was it occupying with reference to whether it was on the east side of the road, west side of the road or middle or where it was?

A. Well when it started it was on the west side of the road and when it finished up it was completely across the east side.

Q. What was the condition of the right-of-way off the highway between Sam Piel's driveway and the drainage ditch, can you tell us?

A. As near as I can remember it was full of snow.

(Testimony of Earnest Byron Brownell.)

Q. And was there a ditch or barrow pit, something of the sort along there?

A. Yes, barrow pit.

Q. And was there one on each side of the road?

A. Yes.

Q. The east side and the west side as well?

A. Yes.

Q. And what does the bridge you mention span, what does it go across? A. Drainage canal.

Q. Do you have any idea of the width of that drainage canal? A. It is 20 feet I think.

Q. Is the canal as wide as the bridge, as wide as the bridge is long, is that the idea? A. Yes.

Q. And can you give us any idea how deep that is. That [69] is from the height of the bridge let us say to the surface of the water? I don't suppose you could tell any more than that.

A. I have an idea it is about 10 feet.

Q. Does the map show how wide that bridge is?

A. Width 24 feet.

Q. Is there room enough for a large truck and a bus to meet; such vehicles as were involved in this accident is there room for them to meet on a bridge of that size and width?

A. Yes, there was plenty of room.

Q. And would they be able to pass each other successfully? A. Yes.

Q. And have you had experience of meeting large vehicles on bridges of that width?

A. Yes.

Q. While you were driving a bus? A. Yes.

(Testimony of Earnest Byron Brownell.)

Q. Now the bridge I believe you said is 20 feet long and 24 feet wide, is that what the plat shows?

A. Yes.

Q. And does the plat show the width of the road both north and south approaching that bridge?

A. Yes, 22 feet oiled gravel width.

Q. So that the oilmat on the approaches was 22 feet wide, is that right?

A. That is correct.

Q. And the bridge therefore was 2 feet wider than the oilmat of the road north of the scene of the accident?

A. Yes. [70]

Q. And you have no trouble meeting vehicles of any legal size on the oilmat of these highways, do you?

A. That is right.

Q. And what kind of rails were on that bridge, if you know?

A. Wooden rails.

Q. Was there any opportunity from the time that you first noticed this other vehicle at the irrigation lateral until the moment of impact for you to get off the road or away from the oncoming vehicle?

A. No.

Q. After the first swerve that was made by the truck would you have had an opportunity to get off the road or to go some place to avoid the oncoming truck?

A. After the first swerve?

Q. Yes.

A. It is possible if I had realized that he was going to get out of control that I could have pulled off right at the Piel driveway, however, I would

(Testimony of Earnest Byron Brownell.)

have been taking a chance of still going into that drainage ditch.

Q. When he made the first swerve did you believe that he was then out of control?

A. Yes, after the trailer dropped back into line I thought he was just hitting his brakes to slow down a little bit. I have seen many trucks do that.

Q. And when he made the second swerve did you believe he was out of control at that time? [71]

A. No, because it still started to straighten up.

Q. And where was the truck when you first realized that he was completely out of control?

A. About 200 feet north of the bridge.

Q. And where were you at that moment?

A. 10 to 15 feet south of the bridge.

Q. Now, Mr. Brownell, you were injured in this accident?

A. Yes.

Q. And you were taken to the hospital from the scene of the accident, were you?

A. Yes.

Q. And you had no opportunity to observe the position of the vehicles after the accident particularly?

A. No.

Q. And you had no opportunity to observe wheel tracks or anything of the sort after the accident?

A. No.

Q. How much were you earning at the time of the accident, Mr. Brownell?

A. \$10.55 per day.

Q. And did you work every day?

A. Yes. That is, maybe I should make that clear. We would make a round trip one day and be off

(Testimony of Earnest Byron Brownell.)

the next, however, that was the same as two day's work. Since the one way portion of the trip was one day's work.

Q. And do I understand then that you would actually make \$21.10 one day and you would not work or get any mileage or be paid for the next day, is that correct? A. That is right. [72]

Q. You drove every other day, or you did two days' driving every other day?

A. That is right.

Q. And what injuries did you suffer in this collision, Mr. Brownell?

A. Two broken legs, and burns, very bad burns, and concussion of the head.

Q. Were you cut at all?

A. Yes, I was cut across the left knee clear to the bone.

Q. Now going back for a moment to your earnings. Were you working regularly prior to the accident, say for a month prior to the accident?

A. I believe, yes, I was outside of a trip or two I took off. Is that what you meant?

Q. Yes. You were working a regular run, is that right?

A. No, not up until the 15th of December.

Q. The 15th of December you took over a regular run, is that right? A. Yes.

Q. And from the 15th of December to the time of the accident you worked that run regularly and steadily. A. Yes.

(Testimony of Earnest Byron Brownell.)

Q. And how do you obtain these runs; are they on a seniority basis? A. Yes.

Q. Now to go back to your injuries. You were taken to a hospital, did you say? A. Yes.

Q. And what hospital were you taken to?

A. Worland hospital. [73]

Q. Is that at Worland, Wyoming?

A. Yes.

Q. And who was your attending physician?

A. Doctor Groshart.

Q. And did he treat you in the hospital?

A. Yes.

Q. And did he treat you for your two broken legs? A. Yes.

Q. Did he treat you for your burns?

A. Yes.

Q. And did he treat you for all the injuries that you had suffered? A. Yes.

Q. Now how long were you in the Worland hospital? How long were you a patient there?

A. I was in the hospital the first stretch thirteen months.

The Court: How many months?

A. Thirteen months.

Q. (By Mr. Lush): That was in the Worland hospital? A. Yes.

Q. And what kind of treatment, what treatment was given to you for these broken legs?

A. Yes, they put me on a fracture bed and put my legs up on racks and with weights on them to get traction. And then six weeks after the acci-

(Testimony of Earnest Byron Brownell.)

dent the right leg was casted but the left leg was on this rack for six months.

Q. When they put a cast on the right leg did they then release it from the weights and pressure? A. Yes.

Q. And when they put the left leg on the rack was it [74] then released from the weights?

A. No, the weights were still on.

Q. And how were those weights attached?

A. They put a pin through the heel in order to hold it, through the whole bone put a pin through it, and then there was some sort of a connection to fasten the rope that the weight was attached to so that it would keep straight out.

Q. And how long was your left leg kept that way?

A. Until the 30th of June, 1947.

Q. And what was done to your left leg at that time?

A. They grafted skin on to my left knee; the skin had been either burned or torn off of the area around the knee.

Q. And did they take that skin off other parts of your body?

A. Yes, part of it was off my stomach and part of it off my left thigh.

Q. And after June 30th, 1947, what was done about your left leg?

A. Well it was in a half cast then until I believe March of 1948 at which time they put it in a full cast.

(Testimony of Earnest Byron Brownell.)

Q. And has it been in a full cast ever since that time? A. Yes.

Q. And when you refer to a half cast do you mean a cast that only covers around the front or back of your leg? Is that what you mean by half cast? [75]

A. Yes. At the time of the skin graft they put this cast on my leg all the way around just like a regular cast but since there were open wounds and this place below the knee was draining they had to cut the top of the cast off so they could dress it and then it was bound with bandages so the back half of the leg was held steady and they would open it up and treat the leg.

Q. You are wearing a cast at the present time, are you not, on that left leg? A. Yes.

Q. And is that a solid cast all the way up and down the leg? A. Yes.

Q. Is there any opening in that cast?

A. Yes, there is a window below the knee.

Q. And is that window at the sight of where the breaks are in that leg?

A. Yes, that is where the bone was pulverized or splintered up so bad.

Q. Now what is the present condition of your right leg, Mr. Brownell?

A. Well, I can get about a 90-degree bend on the knee and my ankle I have no control over the muscles that holds this ankle straight from side to side, and on the toe there is a toe drop which I can't pull the toe up only just a very short distance,

(Testimony of Earnest Byron Brownell.)

about half an inch, and there were four breaks in my right leg. [76]

Q. Where were those breaks in your right leg?

A. There is one just below the knee, and one angles down from that break to one below about half way between the knee and the ankle, and that is on the big bone. The shin bone there is a break in the small bone and also a break in the ankle itself.

Q. Now I believe you said you had trouble keeping your ankle from swinging from side to side, is that right? A. Yes.

Q. And have you been supplied with any corrective devices to help you with that?

A. Yes, the sole has been built up on the outside of the shoe to keep the ankle from turning under when I step on it.

Q. What is the condition of the muscles of your right leg, Mr. Brownell? Do you know anything about the condition of the muscles of your right leg?

A. You mean position?

Q. No, the condition of the muscles?

A. Oh, the condition. Well they are very much smaller than they were before the accident. I don't have as much strength.

Q. Can you bear your weight on your right leg now?

A. Not without the use of both crutches.

Q. And is there any numbness present in your right leg?

A. Yes, the top of my in-step is numb, and the

(Testimony of Earnest Byron Brownell.)

toes are [77] numb, and there is a place along the side of my calf that it is numb.

Q. Are you able to go up and down stairs at the present time on your crutches without other assistance? A. No.

Q. Are you able to go up and down one step such as a curbing without assistance? A. No.

Q. What is the condition of your leg when you get up in the morning; is it any different than during the course of the day or night?

A. Very stiff and painful every morning.

Q. And is that true every morning?

A. Yes.

Q. Does the leg pain you at other times?

A. Yes, it whenever a storm is coming up or a change in weather its very stiff and painful.

Q. And what part of the leg acts in that manner?

A. The knee is stiff and the ankle is very stiff.

Q. What effect does walking have, that is, walking on crutches have on that leg?

A. Well after walking just a short distance it gets very painful and finally plays out on me; I just have to sit down.

Q. And how far do you walk before the leg becomes painful?

A. I would say not over a quarter of a block.

Q. And how long does the pain persist after you have walked a quarter of a block or does it finish as soon as you sit down?

A. About 15 or 20 minutes. [78]

Q. And where is the pain located that you get

(Testimony of Earnest Byron Brownell.)

when you walk, is that in your knee or in your ankle or in the calf muscles or where?

A. Mostly in my ankle, sometimes in the knee.

Q. But mostly in the ankle, is that right?

A. Yes.

Q. Now switching over to your left leg, Mr. Brownell, what use do you have with it?

A. I have no use whatever.

Q. And does the left leg pain you at all.

A. Yes.

Q. And when and under what circumstances does it pain you?

A. Well it of course is the worst during a weather change, however, it doesn't ache at any certain times.

Q. Does it ache frequently? A. Yes.

Q. But not constantly? A. Not constantly.

Q. What was the condition of that leg with reference to pain prior to the skin graft that was put on it? Do you remember that?

A. Well before that time there was just a constant aching, very great pain.

Q. And when was that skin graft put on?

A. On June 30th, 1947.

Q. Now how many breaks are there in your left leg, do you know, Mr. Brownell?

A. There are seven breaks.

Q. That skin graft was six months after the accident happened, is that right? A. Yes.

Q. And those breaks, they have never knitted,

(Testimony of Earnest Byron Brownell.)

is that [79] correct? The bone has never knitted there as far as you know? A. No.

Q. Now I see that you still have a cast on that leg. Is it the cast that forces you to keep the leg out straight? A. Yes.

Q. And do you have any other injuries to that left leg other than the shattering of the bone below the knee?

A. Well just the cut across the knee, the skin torn off of the knee, and then there were other breaks down in the lower part of my leg in the foot.

Q. How many breaks are there in the leg and foot in all, do you know? A. Seven.

Q. Now were you conscious after the accident?

A. Just for a short period.

Q. And do you know whether any treatment was given to you or any aid was given to you before you reached the hospital?

A. I couldn't tell you about that.

Q. Now what is the condition of your hands, Mr. Brownell? The present condition of your hands. Show the court what it is.

A. Some of the tendons were burned on that first joint.

Q. Now starting with the little finger on the right hand does the top joint bend there or is that immobile? A. This is the top joint?

Q. No, this is the first joint. Does that bend?

A. It bends very little. [80]

Q. And the middle joint, does this bend?

(Testimony of Earnest Byron Brownell.)

A. Yes.

Q. And how about the knuckle at the juncture of the hand, does that knuckle bend? A. Yes.

Q. And can you touch the little finger of your right hand back to your palm? Not quite I see.

Q. Can you touch your palm right in the pads of your finger? A. No, I can't.

Q. How about the next finger of your right hand? How about the top joint of it, will it bend?

A. A little.

Q. And the middle finger?

A. That is the best finger on the hand.

Q. And the knuckle where the finger joins the hand, does that bend all right? I am talking about the second finger here?

A. That is as far down as I can get it.

Q. Let the record be made to show the finger can't be moved closer than about one inch from the palm of the hand. And the third finger, the middle finger of your right hand, I believe you said was the best finger of all? A. Yes.

Q. Will the top joint bend? And will the middle joint bend? A. Yes.

Q. Will the knuckle bend? A. Yes.

Q. Can you put that finger back against the palm of your hand? A. No.

Q. Now going to the index finger on your right hand will that finger bend in the first or top knuckle? A. No. [81]

Q. And does it bend in the middle knuckle?

A. Yes.

(Testimony of Earnest Byron Brownell.)

Q. And will it bend in the knuckle where the finger joins the palm? A. Yes.

Q. Can you touch that finger to the palm of your hand? A. No.

Q. And the thumb on your right hand, do you have motion in that? A. Yes.

Q. Complete motion?

A. Well, not as good as it used to be.

Q. Now moving to your left hand, Mr. Brownell, will you describe what motion you have in the little finger of your left hand? Will the top joint bend?

A. Just a very little.

Q. Will the middle joint? A. It bends.

Q. And the knuckle at the juncture of the finger and the hand? A. That bends.

Q. And is the pad of your little finger touching the pad of your palm there?

A. No, I can't reach the palm.

Q. And the next finger of your left hand, will the top joint of that finger bend? A. No.

Q. Will the middle joint bend? A. Yes.

Q. And will the joint at the juncture of the finger and the palm bend? A. Yes.

Q. Can you get that finger back against the palm of your hand? A. Not quite. [82]

Q. Now the middle finger of the left hand, will the top joint bend? A. Yes.

Q. And will the middle joint bend?

A. Yes.

Q. And will the joint bend at the juncture of the finger and the palm? A. Yes.

(Testimony of Earnest Byron Brownell.)

Q. Can you touch that pad to the palm of your hand? A. Yes.

Q. That is the best finger of the left hand, is it?

A. Yes.

Q. And now the index finger of your left hand, will the top joint of that bend?

A. Just a very little.

Q. And will the middle joint bend?

A. Yes.

Q. And will the joint at the juncture of the fingers and the palm bend? A. Yes.

Q. And can you touch that finger against the palm of your hand? A. No.

Q. And the thumb on your right hand, Mr. Brownell, will it bend?

A. The first joint bends hardly any.

Q. And the juncture joint at the juncture of the thumb and hand, that bends all right, is that right?

A. Not all right, no. It will bend.

Q. Can you touch that thumb to the palm of your hand? A. No.

Q. What head injuries did you sustain in this collision, Mr. Brownell? [83]

The Court: We will take a ten minute recess.
(11:15 a.m.)

(Court resumed at 11:25 a.m., at which time all counsel and plaintiff were present.)

EARNEST BYRON BROWNELL
resumed the stand and testified as follows:

Direct Examination
(Continued)

By Mr. Lush:

Q. Mr. Brownell, I believe just before recess I asked you if you had received any head injuries?

A. Yes. I had a skull fracture.

Q. Were you unconscious after the accident?

A. Yes.

Q. And for what period were you unconscious, completely unconscious, if you remember it?

A. Well, outside of—I couldn't tell you exactly; it must have been a very few minutes.

Q. And you regained consciousness when they were taking you back to the hospital do you think?

A. No, I regained consciousness at the steering wheel.

Q. At the steering wheel? A. Yes.

Q. And did you later become unconscious?

A. It was just shortly after these fellows pulled me out of the drainage ditch.

Q. You got from the bus from behind the wheel into the drainage ditch, did you? A. Yes. [84]

Q. Now, when did you regain consciousness after that if you remember?

A. The first time I remember was a month or a little more than a month after the accident.

(Testimony of Earnest Byron Brownell.)

Q. And were you burned in this accident?

A. Yes.

Q. What parts of your body were burned?

A. My hands, face, neck and ears, shoulders and elbows, and spots on my legs.

Q. Now, do you have full motion of both of your wrists, Mr. Brownell?

A. The left is I believe full motion, however, the right is restricted.

Q. And is there scar tissue on that right wrist?

A. Yes.

Q. What was your occupation prior to the time that you became a bus driver, Mr. Brownell?

A. Truck driver.

Q. And for whom did you drive truck?

A. Consolidated Motor Freight.

Q. And for how long did you drive for Consolidated Motor Freight?

A. A year and a half.

Q. And what was your occupation prior to that time?

A. Truck driver.

Q. And for whom did you drive then?

A. Colorado Rapid Transit.

Q. And for how long did you drive for the Colorado Rapid Transit?

A. For seven years. [85]

Q. And what was your occupation before that?

A. Truck driver.

Q. And for whom were you driving then?

A. Different construction companies.

Q. And how long did you drive for these various construction companies?

A. About four years.

(Testimony of Earnest Byron Brownell.)

Q. And what was your occupation before that?

A. Well, I guess you would say a ranch hand.

Q. Ranch hand? A. Yes.

Q. How many years total truck driver experience did you have excluding the bus driving?

A. Just the truck driving?

Q. Just truck driving?

A. Fourteen years.

Q. And during those fourteen years what type of trucks did you drive with reference to whether they were single units or multiple units or whatever they were?

A. Well, just about all types, straight jobs, semis, and what some of them refer to as double beds where you have a trailer and four trailers hooked on behind.

Q. That last unit you described would that be a tractor plus a semi plus another trailer, is that the idea? A. That is right, yes.

Q. How much experience did you have driving a semi? A. About two years.

Q. And for whom did you drive that? [86]

A. A year and a half of it for Consolidated and part of the time for construction outfits.

Q. And during the course of your experience did you have occasion to drive semis on icy roads?

A. Yes.

Q. And you are familiar with the method of handling semis on icy roads? A. Yes.

Q. Now, based upon your knowledge of the conditions that existed on the day of this accident and

(Testimony of Earnest Byron Brownell.)

the place of this accident have you an opinion as to whether or not the driving of the Manning outfit by Hawkins was well or poorly done?

Mr. Goppert: Objected to as invading the province of the court and being a mere conclusion of the witness.

The Court: Well, of course, he is qualified as an expert driver. He drove equipment of that sort about two years. Yes, there is rather a close question there whether he can do more than testify as to the condition of the roadway and how the approaching vehicle was being driven as he saw it and what would be, what speed he was driving, what would apparently be a safe speed over that sort of road. I think that is about as close as he can come to it without giving an opinion there.

Mr. Lush: All right, your Honor.

Q. Mr. Brownell, did you observe the speed of the vehicle that was approaching you?

A. Yes.

Q. Have you had an opportunity from your own driving and from your observation to judge the speed of other vehicles? [87]

A. Yes.

Q. And have you from your own experience had an opportunity to judge what is a safe speed under varying conditions?

A. Yes.

Q. Have you had an opportunity to form judgments as to what is a safe and proper manner for handling a semi under icy conditions?

A. Yes.

Q. Did you observe the movements of the semi that was approaching you from the north?

(Testimony of Earnest Byron Brownell.)

A. The movements?

Q. Yes. A. Yes.

Q. What is your opinion as to the speed at which that vehicle was approaching you?

A. I would say that he was traveling about 50 miles an hour.

Q. And was that when you first observed him?

A. Yes.

Q. And you observed the manner in which the vehicle moved about on the road? A. Yes.

Q. From your observation of the vehicle and your experience as a driver and from your knowledge of conditions on that day do you have an opinion as to whether or not that vehicle was being driven in a careful manner?

Mr. Goppert: That is objected to as calling for a conclusion of the witness.

The Court: Yes. Ask him from his own experience and from his observation what in his judgment would be a safe speed [88] over a roadway in the condition of the road at that time. See what his own opinion as an expert driver would be as to a safe rate of speed.

Q. (By Mr. Lush): Do you have an opinion from your own observation and experience what would be a safe speed for driving a semi over that road from the north, Mr. Brownell.

A. Well, there's a lot of factors to consider and as to how the semi itself felt on ice and as to whether brakes, one brake on one side of the truck would catch before the other one, that is, lock the

(Testimony of Earnest Byron Brownell.)

wheel, but if it was all in good condition, I would say around 35 miles would be a safe speed.

Q. What is the date of your birth, Mr. Brownell? A. July 16th, 1911.

Mr. Lush: You may cross-examine.

Cross-Examination

By Mr. Goppert:

Q. Mr. Brownell, it was on December the 27th, 1946, in the afternoon when this accident happened, was it not? A. Yes.

Q. And at that time you were driving this Burlington bus with approximately 22 passengers in the vehicle northward, were you not?

A. Not with 22 passengers in it. [89]

Q. How many? A. Eighteen.

Q. That was an American Car Foundry Brill type bus, was it not? A. Yes.

Q. 37 seats? A. Yes.

Q. That is, for passengers? A. Yes.

Q. And approximately 35 feet long and 8 feet wide? A. I believe it is—Yes.

Q. And weighing approximately 22,000 pounds unladen weight?

A. I believe it is 19,500 unladen.

Q. How much? A. 19,500 unladen.

Q. Unladen weight? A. Yes.

Q. And you had the passengers' baggage with you? A. Yes.

Q. Do you recall where you first came on the icy road condition coming from the south that day?

(Testimony of Earnest Byron Brownell.)

A. Well, it was spotty from Thermopolis to Worland and then from Worland on to the scene of the accident then it was all ice.

Q. It was all ice from Worland to the scene of the accident as you recall it?

A. Yes. Maybe I should say it was ice with snow on top of it.

Q. As a matter of fact there was an ice condition south of that with snow over it, was there not?

A. Yes.

Q. Didn't that extend down to the middle of the Big Horn Canyon approximately 8 to 10 miles south of Thermopolis? [90]

A. I don't remember any ice in the canyon. There may have been a few spots in the shaded places.

Q. Of course, you were driving the Burlington bus; it was a regular scheduled bus, was it not?

A. Yes.

Q. You left Casper that morning on time I take it? A. Yes.

Q. And you were on time into Thermopolis, were you not?

A. Yes. I believe I was five minutes late.

Q. Into Thermopolis? A. Yes.

Q. And do you recall what your schedule fixed as to the time for leaving Worland? A. 1:55.

Q. And do you recall about what time you left Worland? A. I was about 10 minutes late.

Q. And isn't it a fact that your schedule re-

(Testimony of Earnest Byron Brownell.)

quired elapsed time of 44 miles per hour including stops?

A. The average if you were to average the schedule up you mean?

Q. That is right. Elapsed time from Casper to Billings?

A. I couldn't say as to that. I have never figured it up.

Q. You knew the distance from Casper to Billings? A. Yes.

Q. How many miles?

A. It is 166 to Casper, Greybull, and 125—Well I don't know just exactly what it is. 125 Greybull to Billings, I believe. I made a mistake there; it is 203 to Greybull and 125 to Billings. [91]

Q. You mean it is approximately 328 miles from Casper to Billings? A. Yes, that is right.

Q. And then you left Casper at that time on schedule that took you out of Casper at what hour?

A. 9:00.

Q. 9:00 a.m. A. Yes.

Q. And would get you into Billings at what time?

A. It was 5:40, I believe.

Q. And you had rest stops, did you not, at Shoshone, Thermopolis, and Greybull and Frannie?

A. I couldn't say as to Frannie. A rest stop at Shoshone, Thermopolis and Shoshone.

Q. Beaver was the rest stop, wasn't it, instead of Frannie?

A. I believe they do have a rest stop at Beaver.

(Testimony of Earnest Byron Brownell.)

Q. You were using that at the time you made the run too, were you not? A. No, sir.

Q. Those were 10 minute rest stops?

A. Yes Well, there was a meal stop at Thermopolis.

Q. That was how long? A. 35 minutes.

Q. On this day do you recall the time you left Worland?

A. As I say I think I was about 10 minutes late and the schedule was due out at 1:55.

Q. You were due out of there 1:55 and you believe you were 10 minutes late? A. Yes.

Q. And your best recollection as to your speed, Mr. [92] Brownell, from the time you left Worland to the scene of the accident?

A. About 35 miles an hour.

Q. You recall testifying in this case previously, do you not? And do you recall at that time you testified that it was 35 to 40 miles per hour?

A. Yes. However, that is just an estimate. It is still just an estimate. I don't know, what I mean to say is I wasn't looking at the speedometer.

Q. You did recognize the fact that the road was very icy and very slick from Worland clear up to the scene of the accident? A. Yes.

Q. And describing that would you describe that as being icy on the pavement, that is, the macadam or blacktop pavement, and then on top of that ice a snow had fallen and then packed by traffic, is that the way you would describe it?

A. Out in the center it was packed, yes.

(Testimony of Earnest Byron Brownell.)

Q. Out——

A. Out in the center it was packed, yes.

Q. It covered, that is, where the cars traveled it was packed?
A. Yes, that is right.

Q. And that would be a strip say 16 feet wide or so on the road, wouldn't it?
A. Yes.

Q. And could you see the shoulders of the road very clearly?
A. Well, you could define them.

Q. How? [93]

A. You could define them. You could tell by the snow where the shoulder was.

Q. A little slip of some kind of vegetation come up out on the edge past the blacktop, didn't it?

A. Yes.

Q. And that would show up along and you could see that little streak along each side of the road?

A. I don't remember any vegetation but you could see the hump where the shoulder of the road was.

Q. In other words, the snow going over the rounded shoulder of the road?
A. Yes.

Q. And of course driving out to the scene of the accident you had no trouble seeing just what part of the road you should travel on because the center portion, 16 foot strip in the middle of the road was packed down, was it not?
A. Yes.

Q. And of course coming to the scene of the accident you could see vehicles in front of you for a considerable distance, could you not?
A. Yes.

Q. Was it storming or snowing at the time?

A. Just spitting snow.

(Testimony of Earnest Byron Brownell.)

Q. Just a few occasional flakes or were they pretty thick?

A. Well, I would say occasional; there wasn't very much coming down.

Q. Not a lot? A. That is right.

Q. It was an overcast sky, was it not?

A. Yes.

Q. Sort of made it a little bit darkened from just a [94] cloudy day? A. Yes.

Q. And from the bridge how far south of that bridge could you see it coming from the south the bridge and the scene of the accident?

A. Oh, I imagine you could see it half a mile.

Q. And you could see on past the bridge too any vehicles coming from the north, couldn't you?

A. I believe you can.

Q. And as a matter of fact weren't you approximately 450 feet or 150 yards from the bridge when you first observed a truck coming from the north which later was the one you become involved in the collision with? A. No.

Q. Do you recall having been interviewed on this matter by the State Highway Patrol and the Sheriff of Washaski County, Wyoming, after the accident? A. No.

Q. You don't have any recollection of the statement you gave the Highway Patrol and the Sheriff?

A. No.

Q. I am talking about when you were in the hospital?

A. I don't remember a thing about it.

(Testimony of Earnest Byron Brownell.)

Q. You don't remember telling them that you first observed the truck approximately 150 yards, when you were approximately 150 yards from it?

A. No, sir.

Mr. Lush: You were talking about the bridge and then you crossed over to 150 yards from the truck.

Q. From the truck? [95]

A. I don't remember talking to them about anything.

Q. You don't remember telling the Sheriff or the Highway Patrolmen anything about the accident?

A. No.

Q. You do recall giving a deposition that was taken in the Hennessey cases by Mr. Doepker and Mr. Frank O'Mahoney, do you not?

A. Yes.

Q. Would you state your, from your experience how far, what distance rather you would have had to travel with your bus going at the speed of 35 to 40 miles an hour taking into consideration the roads as you saw them that day before you could bring it to a stop?

A. About 250 feet.

Q. Wouldn't that be nearer 300 feet?

A. That is just an estimate.

Q. How?

A. That is just an estimate.

Q. Well, of course it would be an estimate but wouldn't that be using the best braking and ideal braking situation, or fanning them as truckers call it, and bringing it to a stop on that icy road?

A. You mean it would be closer to 300 feet?

Q. Yes.

(Testimony of Earnest Byron Brownell.)

A. I wouldn't say so. I estimated it 250 feet.

Q. How far did you travel to bring it down from a speed of 35 to 40 miles an hour to a speed of 15 miles an hour, that is, your bus traveling on that icy road?

A. Well, I suppose about 180 [96] feet.

Q. The way you brake it down you would have to roll about 180 feet to get your speed down from 35 miles you were going down to 15 miles an hour?

A. Yes.

Q. That would be your best judgment and how much faster would you have had to gone to completely stop it? A. About 50 feet.

Q. And isn't it a fact that the snow and conditions interfered to some extent with your vision?

A. Well very little; you could see half a mile clearly.

Q. You could see half a mile in front of you clearly? A. Yes.

Q. Did you ever make a full application of the brakes on your bus as you came into the collision?

A. You mean jammed them on?

Q. That is right? A. I don't believe so.

Q. Isn't it a fact that when you were asked a similar question at Worland you stated that you didn't believe you made a full application of the brakes unless it was in the last 5 or 10 feet before the impact? A. That is right.

Q. You made that statement there, did you not, on direct by Mr. Doepker? A. Yes.

Q. Do you recall being asked a question by Mr.

(Testimony of Earnest Byron Brownell.)

Doepker in the taking of the deposition in Worland in December of 1947: And you were driving at approximately 35 to 40 miles an hour northward on U. S. No. 20 from Worland toward Basin, Wyoming? [97] And your answer: That is right. Do you recall that?

A. Would you read that over again, please?

Q. And you were driving—this is the question—And you were driving at approximately 35 to 40 miles an hour northward on U. S. No. 20 from Worland toward Basin, Wyoming? And your answer: That is right? A. Yes.

Q. And when you approached a place approximately 200 feet south of that bridge near where the accident occurred you observed a vehicle headed toward you from the opposite direction? Do you remember being asked that question? And your answer was: That is right.

Q. Did you so testify at that time?

A. Yes.

Q. And the next question: It appeared to be a truck? And your answer was: Yes.

Q. You remember that? A. Yes.

Q. And the next question. At that time you were about 400 feet apart? And your answer: Possibly 450 feet.

Q. Did you so testify at that time?

A. Yes.

Q. And then the next question was: 400 to 450 feet would be your best judgment, is that right? And your answer: I should think so.

(Testimony of Earnest Byron Brownell.)

Q. Did you so testify? A. Yes.

Q. Was it at that time that you observed the trailer portion of his truck swing out toward the center portion of the highway? Answer: Yes, sir.

A. I didn't hear it. [98]

Q. The question is: Was it at that time that you observed the trailer portion of his truck swing out toward the center portion of the highway? Answer: Yes, sir. A. Yes.

Q. You knew you were on very icy road, did you not? Answer: Yes, sir.

Q. And then the next question—Did you so answer at that time? A. Yes.

Q. But you immediately applied your brakes lightly? Answer: Yes.

Q. Did you so testify at that time?

A. Yes.

Q. And then you were also asked this question at that time: Now the place you locate or one that you first saw this tractor was that you were just south of that driveway into the ranch house just south of the bridge, is that right? And your answer is: Yes.

Q. Was that right?

A. Could I have that again?

Q. Now, the place you locate or one that you first saw this tractor was you were just south of that driveway into the ranch house just south of the bridge, is that right? And your answer: Yes.

A. I don't remember any question about the ground.

(Testimony of Earnest Byron Brownell.)

Q. Well, to help refresh your memory, about how far south of that driveway or entrance road were you? And your answer: I suppose 10 to 15 feet.

A. Yes.

Q. You remember making that statement?

A. Yes.

Q. And locating your bus approximately 10 to 15 feet south [99] of this Piel driveway?

A. That is right.

Q. And it was from that place you said it was a distance of approximately 400 to 450 feet to the Manning tuck, that is right, isn't it?

A. Didn't I say 450 to 500?

Q. Beg your pardon. The record as I read it to you and you testified you said possibly 450 feet; Mr. Doepker said 400 to 450 feet.

A. Yes, sir.

The Court: I think we had better suspend here. We will take a recess until two o'clock p.m. (12:00 noon).

(Court resumed at 2:00 o'clock p.m., at which time all counsel were present, and plaintiff was present.)

The Court: Proceed. [100]

EARNEST BYRON BROWNELL

resumed the stand and testified as follows:

(Continued)

Cross-Examination

By Mr. Goppert:

Q. Mr. Brownell, I believe at the time of the recess we were considering the speed at which the bus was scheduled on the regular time table schedule and I want to ask you if that speed wasn't 44 miles per hour, leaving out the—that is, leaving out the time for rest periods and lunch?

A. I don't know what the average is on that.

Q. You recall testifying by deposition in December of 1947? At that time didn't you answer that question: About 44 miles per hour?

A. Yes, although that particular run I believe I was mistaken about it at the time. The only run I tried to figure out the average was on the main line between Cheyenne and Rock Springs.

Q. You think you were confusing the time on this run with [101] the run on the main line between Rock Springs and Cheyenne?

A. No, that was I wasn't confusing the same but the way the question was put was as to the average of these schedules and I don't know what that schedule on that particular run was.

Q. You hadn't figured it out? A. No.

Q. You had only been on the run since the 15th of December, 12 days? A. Yes.

Q. And made six trips? A. Yes.

(Testimony of Earnest Byron Brownell.)

Q. What was this, the sixth one?

A. What did you say?

Q. Was this trip that resulted in this accident the sixth trip you had made on that run from Casper to Billings?

A. Well, I couldn't say right now whether it was or not without thinking about it.

Q. In estimating the speed of these vehicles I believe your evidence now is that your vehicle was going at 35 miles per hour and the other one was coming toward you at 50 miles per hour?

A. Yes.

Q. That is before either of you slackened your speed at all? A. Yes.

Q. Isn't it a fact that shortly after this accident you made the statement that you thought the truck would pass you on the bridge and that you slowed your vehicle down in order to prevent that?

A. I don't remember.

Q. Isn't it a fact that you told the Highway Patrolman [102] and the Sheriff "that I started to slow down as I didn't want to meet him"—meaning the truck—"on the bridge."

A. I couldn't say whether I said that or not.

Mr. Lush: Your Honor, Mr. Brownell already testified he doesn't remember ever seeing the Highway Patrolman or Sheriff after the accident.

The Court: Yes, I think you referred to that once before.

Mr. Goppert: That is right.

Q. (By Mr. Goppert): Now then you testified

(Testimony of Earnest Byron Brownell.)

that your speed when the collision, the actual impact of the collision took place was approximately 15 miles per hour? A. Yes.

Q. What was the speed of the vehicle that was then coming toward you or was headed southeast on that roadway, I believe you said?

A. About the same speed I would say.

Q. As yours? A. Yes.

Q. And it was coming sideways? A. Yes.

Q. Now, as I understand it that vehicle was headed with the front of it southeasterly and the rear of it was toward the northwest diagonally across the highway, was it not, just before the collision? A. The tractor?

Q. Yes.

A. You say the radiator or the front of the tractor was headed southeast? [103]

Q. That is right?

A. And the rear end of the tractor was headed northwest?

Q. That is correct, is it not? A. No.

Q. How was the direction?

A. Well, if the front end was headed northeast the rear end would have to be headed towards the——

Mr. Goppert: Pardon me. I don't know whether I am confused or you.

A. Did you say the southwest?

Q. Yes, southwest for the front end?

A. And northwest?

Q. And northeast for the rear end?

(Testimony of Earnest Byron Brownell.)

A. Well, that is correct.

Q. That is correct, is it? A. Yes.

Q. I think maybe we got confused there. And it was headed toward the south, I mean the vehicle itself was moving southeast, was it not, immediately before the collision? A. Yes.

Q. I am talking about the tractor part of the truck that part was going southeast even though the vehicle itself was headed the way that you have just described? A. Yes, that is right.

Q. In other words, it was sliding southeast?

A. Yes.

Q. Across that roadway that you were going to travel over? A. Yes. [104]

Q. And how long a skid in that direction did that truck make before you contacted it or it contacted your vehicle, would you say 150 to 200 feet?

A. No.

Q. How far?

A. I suppose 20 to 25 feet, somewhere along there.

Q. Did it just gradually slip into that position as it came across the roadway? A. Yes.

Q. You talked about it, this being the third skid you had seen on that vehicle and as I understand it you place the beginning of this third skid at a point approximately west of the Lamb entryway, the one you marked "C," did you not? A. Yes.

Q. And it ended up, did I understand you to say it ended up 10 feet north of this bridge that is

(Testimony of Earnest Byron Brownell.)

marked timber bridge on this Plaintiff's Exhibit 1?

A. Yes.

Q. And during that distance did it first start out with the front end of the tractor headed southeasterly or did it start with just swinging the back end out and gradually come around there in an arc?

A. When it first started skidding as I remember the trailer was all that was doing the skidding over into my side of the road.

Q. The trailer swung out first, did it?

A. Yes.

Q. And it created a great big arc with the trailer swinging to the east side first and pulling the tractor around, is [105] that right?

A. Well, it didn't pull any of the tractor around until after the wheels on the trailer struck the right side of the road on the east side of the road.

Q. It was the rear wheels of the trailer that hit the east side of the road and the tractor was still headed southeasterly before that hit, that is, the rear end of the trailer hit the east side of the road?

A. Yes, that is, the tractor was still over on his side of the road.

Q. The tractor was still on the right hand side of the road? A. Yes.

Q. Then it hadn't started across the road from this first slide across the road from the Lamb driveway down to the bridge that hadn't started yet at that time?

A. Not when the trailer wheels were on the edge

(Testimony of Earnest Byron Brownell.)

of the road; it was when they hit the edge of the road.

Q. I want to get that straight. The tractor itself as I understand it was still on the right hand side of the road when the trailer swung over and got over in the east barrow pit? A. Yes.

Q. And was that tractor on the west side of the road at the time that the trailer actually hit the east barrow pit, the rear end of it? A. Yes.

Q. And where did that trailer hit the east barrow pit? [106]

A. About 75 feet north of the bridge.

Q. Bridge down here? A. Yes.

Q. And the tractor was still on the right hand side of the road clear to that place? A. Yes.

Q. And then what happened, did it pull the tractor on over across the road in front of you?

A. Yes.

Q. Just before the accident, just before they struck, you observed someone in this truck, didn't you, driving it?

A. Yes, just before the point of impact.

Q. Did you have occasion to see him and observe how old he was?

A. I got just a split second glance of him.

Q. You come to a conclusion on his age, didn't you, and so testified?

A. I could make a guess at it.

Q. You say you could make a guess and was that what you were doing when you testified at Worland in December of 1947?

(Testimony of Earnest Byron Brownell.)

A. Well, I wouldn't try to say definitely that he was only a certain age when I only seen him a split second.

Q. You do recall testifying definitely at that time, do you not, that he was approximately 21 years of age?

A. I don't remember saying definitely.

Mr. Lush: I object, your Honor, unless the question is read to the witness, to forcing the answer upon him. [107]

The Court: Yes, and you ought to let him look at it too and see it in print. Just show it to him.

Q. (By Mr. Goppert): Directing your attention to this question and answer that appears. Do you see all right at that distance? Isn't it here you are to see?: Q. You say he was about 21 years of age? Answer: I would say around there.

Q. Did you so testify at that time?

A. Yes.

Q. Then you were asked the next question: What would you say if I told you he had a child about 15 years of age? Your answer: I would say he was a pretty fast worker. A. That is right.

Q. Just before the collision as I understand it you endeavored to turn your bus to the right, is that right? A. Yes.

Q. Did you try to make that turn while a part of the bus was still on the roadway—I mean on the bridge? A. Yes.

Q. Isn't it a fact that you also swerved your bus to its left before coming up on the bridge?

(Testimony of Earnest Byron Brownell.)

A. No.

Q. You could see before you collided the portion of the truck you were going to hit, did you not?

A. Yes.

Q. And what portion was that?

A. Well, if I had held straight ahead I would have hit the side door of the cab.

Q. And where did you hit?

A. Just behind the cab. [108]

Q. You do know that, do you not? A. Yes.

Q. That is, you aren't telling now what somebody told you but what you saw when you hit?

A. That is what I saw.

Q. Now, when you saw that trailer go out in front of the—I mean cross over in front of your lane of travel and hit clear over on the east side of the roadway it was 75 feet north of the bridge?

A. I would estimate it 75 feet north of the bridge at the time it hit.

Q. And where were you at that time?

A. I was just going on to the bridge.

Q. And then the outfit came toward you a distance of 65 feet from that time while you went over the bridge in a distance of 10 feet? A. Yes.

Q. Traveling at the same speed you were?

A. I didn't say he was traveling at the same speed.

Q. Well, when you hit were you traveling at the same speed? A. Yes.

Q. You did observe then, did you not, that that bus or that truck and its trailer had skidded and

(Testimony of Earnest Byron Brownell.)

was entirely out of control when it was 75 feet north of the bridge? A. Yes.

Q. As a matter of fact you observed it was out of control when it was in front of that Lamb driveway, didn't you? [109] A. Not——

Q. It hadn't gotten clear across the road yet?

A. No.

Q. You do know from experience in driving trucks and buses when they are going to skid on ice that you can't stop them, don't you? A. Yes.

Q. And they go anywhere, isn't that a fact?

A. Well, they don't just go anywhere; that depends on where you put them.

Q. Coming down to your employment you have related did I understand 12 or 14 years of truck driving? A. About 14 years I believe.

Q. And how many as bus driver?

A. Three years and three months.

Q. And until you got this steady run on the 15th of December, 1946, did you have a steady run for the Burlington Trailways?

A. At times, yes.

Q. You were out-seniorred on seniority?

A. At times, yes.

Q. Could you give the court the amount of your net earnings for the year 1946?

A. I believe it is around \$3500. You say net earnings?

Q. Yes, net?

A. That would be with withholding tax out.

Q. And deductions out?

(Testimony of Earnest Byron Brownell.)

A. I believe that was the gross. [110]

Q. And there would be about \$500.00 deducted for social security, withholding and the other things that are taken out?

A. Yes.

Q. Did you have taken out of that something for a disability fund or anything of that kind?

A. Disability fund?

Q. Yes.

A. I don't remember anything about a disability fund. We did have an insurance; that is, a group insurance.

Q. Well, that is what I mean, to cover disabilities from employment?

Mr. Lush: Your Honor, I object to any testimony being taken from this witness on any insurance he might have purchased out of his paychecks or otherwise.

The Court: Well, what do you say as to the materiality? Is that competent?

Mr. Goppert: I feel, if the court please, that all funds to which contribution is made by the employer at lease are proper in evidence and I understood they had a fund that was contributed to partly by the employer and partly by the employee to cover accidents or loss of time from accidents.

Mr. Lush: If such a fund existed, your Honor, I know nothing of it. There was an insurance fund to which this man was making contributions and his payments to insurance funds certainly are not deductible from his earnings in mitigation [111] of damages here, nor any amount paid to him from

(Testimony of Earnest Byron Brownell.)

any insurance policy or insurance fund be deductible from his damages or be permitted to be shown in mitigation of damages.

The Court: Did you say you have any authority on that. I am inclined to think they are not deductible, but the law changes sometimes very quickly from day to day.

Mr. Goppert: I will refrain from asking any further questions on that until we have some authority.

The Court: I don't think it is deductible. That is my recollection of it, but if you find something to the contrary since I formed that opinion we will consider it, of course.

Mr. Goppert: I will refrain from asking questions on it until I do find some authorities I do wish to submit.

The Court: All right.

Q. (By Mr. Goppert): You don't have anything like the railroad retirement fund for truck drivers? A. No.

Q. You do have, do you not, the so-called social security? A. Yes.

Q. The same as other employees? A. Yes.

Q. In regard to your wages your net wages then were about \$3,000.00, during 1946?

A. I believe that is right.

Q. That would be the amount of your paychecks? A. Yes. [112]

Q. But that didn't include any deduction for

(Testimony of Earnest Byron Brownell.)

this group insurance that counsel was talking about?

A. Well, this group insurance we were talking about——

Mr. Lush: Your Honor, I object to any inquiries with reference to group insurance.

Mr. Goppert: That is the other way around. Was anything taken out on that. I don't think there was. I think he paid it out of his own pocket.

The Court: Well, let him answer it.

Q. I will put it this way. There was no withholding for any group insurance or anything of that kind? If you had it, you paid it yourself?

A. Yes, we had an insurance policy but it didn't cover me on the job; it covered me and my family off the job.

Q. That is something you paid for yourself; it wasn't anything deducted from your wages, was it?

A. They took it out of my wages.

Q. Could you tell us what your earnings were for the previous five year period, net earnings?

Mr. Lush: I object, your Honor. That is too remote.

The Court: Yes, I think so. Sustain the objection.

Q. Do you know how many days you worked in 1946? A. No, I don't.

Q. How many days did you work per week in 1946 on the average? [113]

A. Well, the way that was worked on the Trailways if you were on a steady run and didn't lay off

(Testimony of Earnest Byron Brownell.)

you could work the equivalent of one way run per day unless the assignment had an assigned relief.

Q. Well, Mr. Brownell, I didn't want to get into the detail of it but you probably know about how many days you spent in 1946 on your work and how many you were off? You were off part of the time there, weren't you, in 1946? A. Yes.

Q. About how much time did you miss from your employment in 1946?

A. Well, I wouldn't have any idea.

Q. Would it be fifty days?

A. I suppose I could estimate thirty days.

Q. Thirty days. Then you worked Sundays and holidays and every day except thirty days approximately in 1946, is that right? A. Yes.

Mr. Goppert: That is all.

Redirect Examination

By Mr. Lush:

Q. Now, Mr. Brownell, when you said you worked all but thirty days in 1946, when you are actually on the run every other day you consider that full time work, is that true? [114] A. Yes.

Q. So that when you say you missed thirty days your best estimate is that you missed thirty days in 1946, does that mean you missed fifteen runs or does it mean you missed thirty runs during the course of the year?

A. Well, that is hard to define on account of the way they work their board.

Q. Well, now if you worked every other day for

(Testimony of Earnest Byron Brownell.)

the entire year, then you would work and actually be on the job one-half of 365 days, wouldn't you?

A. Yes.

Q. And that would be 182 days roughly, would it not? A. Yes.

Q. So that you would actually make about 182 runs in a year if you were working complete and full time? A. Yes.

Q. And when you said that you probably missed thirty days during 1946 does that, do you mean that you lost 15 of these 182 runs or 30 of these 182 runs?

A. Actually that would be 15.

Q. You figure you lost about 15 runs from steady work? A. Yes.

Q. And steady work is actually driving every other day, is that right? A. Yes.

Q. Now, when you were testifying here with reference to where you saw the truck go and where you saw the trailer go, that is, the tractor and the trailer and so on and so forth, [115] were those estimates of the distances that you were giving there? A. Yes.

Q. And when you testified as to the position in which you first saw the truck or first paid particular attention to the truck as 425 feet north of the bridge or north of the center line of the bridge approximately was that an estimate? A. Yes.

Q. And was that estimate based on the map here? A. Yes.

Q. And when you stated that you saw the vehicle coming from the opposite direction approximately

(Testimony of Earnest Byron Brownell.)

when you were about at Sam Piel's driveway that is your nearest recollection of where your vehicle was when you first saw the truck at the rise in the road, is that right? A. Yes, that is right.

Q. Now, Mr. Goppert asked you whether it was not true that when a truck or bus started to skid on a road it would just go anywhere, did he not?

A. Yes.

Q. And you replied that it wouldn't just go anywhere, it would go where you put it or it depends on where you put it, is that right? A. Yes.

Q. How do you control the movements of a truck or bus on slippery road once it starts to skid?

A. Well, the only way you can control it is to keep those wheels turning.

Q. How do you go about keeping the wheels turning? [116]

A. By not applying enough brake to lock them.

Q. And if you apply enough brake to lock the wheels, what happens?

A. Then the wheels come to a stop and they are locked and then you lose absolute control of the vehicle.

Q. From your experience you observed this other vehicle all the time while it was coming down the road, don't you—did you not? A. Yes.

Q. And did it appear to you that the, from the actions of the other vehicle that the wheels had been locked on it at any time?

Mr. Goppert: That is objected to, if the court please, as calling for a conclusion of the witness, mere conjecture.

(Testimony of Earnest Byron Brownell.)

The Court: Yes.

Q. Now, if a vehicle goes into a skid on ice, you said that you must get those wheels rolling, did I understand that correctly? A. Yes.

Q. And would you do that by releasing the brakes?

A. And you set pressure and the wheels are still rolling and then you have a chance to steer it.

Q. When the wheels are locked is it possible to steer the vehicle? A. No.

Q. And when the brake is released enough so the wheels turn is it then possible to steer the vehicle?

A. Yes.

Q. And how do you go about doing that? [117]

A. Well, you have to apply pressure to your brakes as much pressure as you can and still keep the wheels turning.

Q. And that would be if you were attempting to stop the vehicle? A. Yes.

Q. And if it should just fall into a skid when brakes were applied and you wanted to take it out of the skid, how would you do that?

A. Release the brake.

Q. And would you, would it be necessary to turn your wheel too? A. Well, possibly, yes.

Q. When you have vehicles such as those involved here, that is, the Manning vehicles, and when they fall into a skid is it possible to take them out?

Mr. Goppert: That is objected to as calling for a conclusion of the witness. If you get into a skid they can do it sometimes.

(Testimony of Earnest Byron Brownell.)

The Court: Yes.

Q. Did you observe the Manning vehicle taken out of a skid?

A. The first two times. The trailer went the first time, the trailer skidded and straightened up, and the second time it almost straightened up.

Q. And the third time?

A. It went completely across the road.

Mr. Lush: That is all.

The Court: We will take a recess at this [118] time. (3:25 p.m.)

(Court resumed, pursuant to recess, at 3:45 o'clock p.m., at which time all counsel and plaintiff were present.)

Mr. Lush: Your Honor, during the recess Mr. Goppert and I have entered into a brief stipulation that we would like to read into the record. It is stipulated by and between the parties through their respective attorneys that had inquiry been made Mr. Brownell on cross-examination would have testified that he now is capable of driving a pleasure automobile which is equipped with a hand control for the brakes and a hand control for the clutch since July, 1948.

The Court: Very well. Are you ready with your next witness?

JOHN S. NICOLA

was called as a witness for plaintiff, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lush:

Q. Will you state your full name, please?

A. John S. Nicola.

Q. And what is your occupation?

A. County Sheriff.

Q. And of what county are you the Sheriff?

A. Washakie County, Wyoming.

Q. And where do you live?

A. In Worland.

Q. And is Washakie County in Wyoming the county in which [119] this accident happened?

A. Yes, sir.

Q. And how long have you been Sheriff of Washakie County?

A. I am in my fifteenth year.

Q. Did you have occasion on December 27th, 1946, to go to the scene of an accident between a Manning semi and a Burlington Trailways bus about 9.2 miles north of Worland?

A. Yes, sir.

Q. And about what time did you go to the scene of the accident?

A. I arrived there about 3:00 p.m.

Q. And were you able to determine about what time the accident had happened?

A. Well, in checking back on the time we de-

(Testimony of John S. Nicola.)

terminated it was around 2:30 as near as we could establish.

Q. When you arrived on the scene of the accident what was the condition of the vehicles as to whether or not they were burning?

A. They were both burning.

Q. And what was the position of the bus on the road when you arrived at the scene of the accident, Sheriff?

A. It was directly right angles east and west to the highway going north and south.

Q. And what direction was it facing?

A. East, slightly to the north of east.

Q. And the rear end of the bus was where with reference to the center of the road? [120]

A. Well, the extreme rear end the bumper and so to speak was, I believe, just west of the center.

Q. Just west of the center you say?

A. Yes.

Q. And where was the bus with reference to the north edge of the bridge?

A. Just beyond it.

Q. Just north of the bridge?

A. Yes.

Q. And where was the bus with reference to the county highway that crosses U. S. 20 at that point?

A. It was heading—the bottom of this picture is east, is it not?

Q. East.

A. It was heading east down this road.

Q. And was the bus on that highway?

A. Partly, yes.

Q. Partly? A. Yes.

(Testimony of John S. Nicola.)

Q. And what part of the bus was off on that highway? A. The rear end.

Q. And all of the forward part of the bus was on the highway, was it?

A. On this county road, yes.

Q. Yes, on this county road. Now what was the position of the tractor part of the Manning outfit when you arrived there?

A. It was setting about at this angle.

Q. To what? A. To the bus.

Q. Which hand illustrates the bus?

A. This would be the bus and this would be the tractor here. It would be about this angle. [121]

Q. It was pointing at the side of the bus generally, is that right? A. That is right.

Q. Was it pointing slightly toward the center of the bus or slightly toward the rear of the bus?

A. Slightly toward the rear, a little rear of center.

Q. And where was the Manning tractor with reference to the Highway 20?

A. Well, the front part was on the highway, front wheels were near the center, as I recall it, about the center, and the tandem duals, the drives, would, of course, be at an angle, the left one was just off the shoulder, and I think the other one was just on top.

Q. And were they on the east or west side of the road? A. On the east side.

Q. Now, Sheriff, I don't quite get this picture.

(Testimony of John S. Nicola.)

As I understand this testimony, the bus was pointed east on this road, was it? A. That is right.

Q. And the truck was pointed in what direction on highway 20?

A. Well, it would be the front end of it would be pointing in a southwesterly direction.

Q. In a southwesterly direction?

A. Yes, so it would be in this angle.

Q. And would you say that the angle of the tractor was more southerly, that is, more north and south or more east and [122] west?

A. No, it would be south of west.

Q. It would be south of due west?

A. I would say it would be at an angle of west and southwest.

Q. Closer to west than southwest?

A. Yes.

Q. And where was the tractor that was involved in that or the trailer that was involved in that accident when you arrived there?

A. It was setting directly parallel with the highway.

Q. And where was it with reference to the highway?

A. Well, the right hand side of the trailer and the right rear wheel was just up on the shoulder and the left was in the barrow pit.

Q. And was the trailer attached to the tractor at the time you arrived there? A. Yes, sir.

Q. And was the trailer burning at all?

A. The front part of it, yes.

(Testimony of John S. Nicola.)

Q. And the tractor unit, was it burning?

A. Yes, most of the fire on it at that time was on the tandem wheels, the rubber was burning on these; it had eight drive wheels on it.

Q. And on which side was this on fire?

A. On all the wheels on the truck, more severe in spots on some of the wheels than others, but they were all burning. The fire was coming up around the front end of the trailer. [123]

Q. And did anyone ride out to the scene of the accident with you?

Q. My Under-Sheriff, Mr. Cooke, was a few hundred yards ahead of me.

Q. He drove out in one car and you went out in another, is that the idea? A. Yes.

Q. And did you have an opportunity to observe the road coming north from Worland?

A. Yes.

Q. And what was the condition of the road coming north from Worland? A. Very slippery.

Q. Now, when you arrived at the scene of the accident, Sheriff, could you determine whether or not any of the vehicles had been moved since the accident? A. No, they hadn't been.

Q. Did you make inquiries to find out whether they had been moved? A. Yes.

Q. And you were able to learn the fact they had not been moved?

A. Yes, I was told by a group of bystanders, I couldn't name any of them today, asked if anybody bothered anything, and they said no. Of course, the

(Testimony of John S. Nicola.)

amount of fire there, couldn't anybody bother them any way not at that time.

Q. Now, did you examine the road in both directions from the scene of the accident, Sheriff?

A. For a distance, yes. [124]

Q. And about how far north did you go from the scene of the accident?

A. Well, we went up to what is commonly called the lateral, that hump in the road and beginning then the tractor and trailer tracks.

Q. And were you able to observe the truck and trailer tracks there?

A. Yes, we traced them to the truck and trailer both ways forth and back.

Q. And from your observation of the tracks that had been made by the tractor and trailer could you determine the course that the tractor and trailer had followed in coming down the road?

A. Well, there were several wobbles and wrinkles in them to begin with and then they began to come across the road at an angle to the east side of the road and finally into the barrow pit and then right along the shoulder of the road.

Q. And where did you observe the first wobbles as you described them in the tracks?

A. Well, I will have to estimate that. It was near that what they refer to the hump in the road on that irrigation ditch, just what point in exact feet I can't tell you.

Q. It was near the irrigation lateral?

A. That is right.

(Testimony of John S. Nicola.)

Q. And where did you, where did the marks indicate that the vehicles had gone into the final skid before the collision? [125]

A. Well, I believe it was about opposite Martin Lamb's driveway or just south of it, probably a little south of it.

Q. Did the vehicle or vehicles go across the road at a sharp angle or was it a long angle that they took across the road?

A. One was rather a long angle.

Q. Rather a long angle? A. Yes.

Q. And did it appear to you that, from the marks that the truck and trailer were in line with each other as they went across the road?

A. No, it didn't.

Q. Which appeared to have crossed the road first, the tractor or the trailer, if you could determine?

Mr. Goppert: That is objected to, if the court please, as calling for a conclusion of the witness. We wouldn't have any objection to telling about any marks he saw.

The Court: Well, you may inquire if from the marks discovered there he could tell which crossed the road first. Could you do that?

A. I don't believe I could, no.

Mr. Lush: All right.

Q. You said you had been Sheriff of this county for fifteen years?

A. I am in my fifteenth year.

Q. And during the course of those fifteen years

(Testimony of John S. Nicola.)

you have had the occasion to visit the scene of accidents at various times?

A. Yes, lots of them. [126]

Q. And is it part of your duties as Sheriff and do you attempt to reconstruct the scene how an accident happened from the marks and the positions of the vehicles and so forth and so on after the accident happened? A. Yes, we try to do that.

Q. And have you ever had any particular training in that field? A. Yes.

Q. And what is the nature of that training?

A. Well, I was, attended the F.B.I. Academy in Washington, D. C., where we had considerable training under experts in the field.

Q. And was part of that training you received in the F.B.I. in Washington on the reconstruction of the scene of accidents?

A. Yes, it was part of it.

Q. And how long did that school last?

A. Well, it was fourteen weeks school. We had ten days on traffic, two weeks on traffic.

Q. Two weeks?

A. Traffic to learn in general.

Q. And was that traffic training given by an expert in the field? A. Yes, it was.

Q. And when did you take that training?

A. In 1945.

Q. And since 1945 have you had occasion to examine the scene of many accidents?

A. Yes, sir.

Q. And have you had opportunity to and was

(Testimony of John S. Nicola.)

it part of your duty to reconstruct what happened at the scene of those [127] accidents from the marks and positions of the vehicles afterwards?

A. Yes, we always try to determine the facts of what happened and how it happened and if possible why and as much as we can learn.

Q. And you did examine the tracks of the tractor and trailer combination that came down the highway from the north on that particular occasion?

A. Yes, as near as we could figure out we traced them there.

Q. And did the marks that you followed going down going in a southerly direction lead up to the tractor and trailer? A. Yes, sir.

Q. And what conclusion did you reach from the examination of those marks as to the movements of the tractor and trailer in going down that highway?

Mr. Goppert: That is objected to as calling for a conclusion of the witness.

Mr. Lush: Your Honor, I asked for the opinion of an expert.

The Court: In what respect? You mean as to whether it went in a straight line or?

Mr. Goppert: He has already testified to that.

Mr. Lush: Yes, your Honor, I believe he has but I think he has reached some other conclusion from the movement of [128] that vehicle from the examination of the tracks and being an expert on the reconstruction of movements of vehicles from the tracks and positions of the vehicles afterwards

(Testimony of John S. Nicola.)

I think it is perfectly proper for him to testify as to those conclusions.

The Court: Well, yes, I believe you could save time by letting him testify and then, of course, on cross-examination it can be fully developed.

A. Well, in my opinion from looking at the tracks the brakes were set on the vehicle.

Q. The brakes were set on what?

A. On the tractor; they appeared to be set on the tractor.

Mr. Goppert: I move the answer be stricken as being a mere conclusion of the witness.

The Court: Well, it does seem to me. Well, we will let it stand as it is and see what the cross-examination develops. I don't know how he could tell whether the brakes were set or not unless he examined the tractor and examined the brakes and found how they stood after the accident happened. I don't know what the condition of the highway, other vehicles that traveled back and forth, I can't quite see what the condition of the highway would be there to reveal to him a condition of the brake.

A. If I could illustrate for the court on that particular point. [129]

Mr. Lush: There was no further traffic through that place because the position of the wrecked vehicles prevented them from getting past, and it is the contention of plaintiff that the act of negligence of the defendant in this case through his servant was the improper application of the brakes to the tractor.

(Testimony of John S. Nicola.)

The Court: Well, we will let it stand for the time being and see what develops on cross-examination to further enlighten the court on the subject and then I will be able to tell sometime what value there appears to be, what value the evidence is really in my own opinion later.

Mr. Lush: All right, your Honor.

Q. (By Mr. Lush): Now, did you go south of the highway at the scene of the accident?

A. Well, I came from town out there.

Q. Well, did you go back south to examine tracks? A. Yes.

Q. And about how far south did you go from the scene of the accident?

A. Oh, back about Mr. Piel's driveway.

Q. And were you able to find any tracks there of a dual wheels? A. Yes.

Q. And where were those tracks with reference to the right or left hand side of the road going north? [130]

A. Well, there was one very distinct set right along the right hand shoulder of the road and it continued up to the bridge.

Q. Continued up to the bridge? A. Yes.

Q. And could you follow it then on through the bridge?

A. No, not to be definite of it because it, the heat from this burning bus it melted most of the snow and the wind had blown a lot of ashes on to the floor of the bridge so you couldn't tell that definitely.

(Testimony of John S. Nicola.)

Q. Do those tire tracks appear to you to be the marks of a bus?

A. We took them to be that, yes.

Q. And what led you to the opinion that those were the marks of the bus?

A. Well, the size of them for one thing and the appearance of brake having been applied to them they had cut down, due to the friction they had cut down in to the snow. The snow was loose on the shoulder and wasn't packed.

Q. Then it was from the fact that they were in line with the rear end of the bus and that there appeared to be application of the brakes to them that you concluded that the marks that you saw were the marks of the bus, is that right?

Mr. Goppert: If the court please, that is objected to as being misleading and a misstatement of the testimony of the witness; he didn't say it was in line with the rear wheels of the bus and he didn't say there had been any brakes applied. [131]

Q. (By Mr. Lush): I thought in the answer to the last question he said it appeared there had been brakes applied, did you not? Did I understand you?

A. It appeared that way to us there had been brakes applied to this dual which picked up the snow into the ice and gravel.

Q. Did you make that answer?

A. I didn't say the track went up to the bus.

Q. Did you make reference to the brakes of the bus in answer to my previous question? That is,

(Testimony of John S. Nicola.)

the brake marks, the appearance that track had of the brakes being applied?

A. Yes, it appeared the brake had been applied.

The Court: He said before the bus had reached the bridge. A. Yes.

Q. (By Mr. Lush): Now, did you observe any skid marks along there?

A. Well, these duals were picking up the snow. The snow was loose on the shoulder and they picked it up pretty well and spread it out, and it was pretty well clear; there was only this much snow left in that particular place, approximately three inches.

Q. About how much?

A. About three inches.

Q. And did those tracks go in a straight line?

A. Yes, they were. [132]

Q. There was no sign of side swerving or skidding to them? A. No.

Q. Had there been other traffic come up to the scene of the accident before you examined for the marks out on the edge of the road?

A. I think there had been a few, one or two cars came by that driveway we understood. There was none in there at the time we arrived; they were ordered out of there.

Q. And who ordered them out, do you know?

A. Well, I think some of the bystanders, some young man told me he had been keeping cars out of there and we continued to do it, of course.

Q. To the best of your information, knowledge

(Testimony of John S. Nicola.)

and belief were there any dual wheel vehicles beyond Sam Piel's driveway after the accident and before you arrived?

A. I never knew of any, no.

Q. Is there a shoulder along the road on the east side of the road for the full length that is shown on the map with the exception of the bridge area? A. Yes.

Q. And was there a shoulder on the west side north for the entire distance shown on that map with the exception of the immediate bridge area?

A. Yes, the construction there is two foot shoulder outside of the pavement.

Q. And how wide is the oilmat? [133]

A. The oilmat is 22 feet.

Q. And the shoulders are 2 feet on each side beyond that? A. Yes.

Q. And how wide is the bridge, do you know?

A. 24.

Q. And how long is the bridge?

A. 20 feet and some odd inches, 3 inches, I believe.

Q. Now, Sheriff, will you describe the barrow pits on each side of the road, that is, the east side and the west side from the point of the irrigation lateral down to the bridge?

A. Well, they are just about the ordinary run of barrow pits.

Q. About how deep would they be?

A. Oh, from road level I would say to the best of my knowledge probably from road level to the

(Testimony of John S. Nicola.)

lowest point of the barrow pit possibly 3 and one-half feet.

Q. And about how wide were they?

A. It is hard to tell.

Q. Approximately?

A. There is an, irrigation ditches in there and trees.

Q. Do you mean they would vary in width from place to place?

A. At times. Sometimes the Highway Department lets them build waste ways along the barrow pit. There is variation but [134] I would hate to say how wide they would be along there. To the best of my recollection, though, they should be somewhere around 20 odd feet from the shoulder of the road to the fence.

Q. From the shoulder of the road to the fence would be about 20 feet?

A. Yes, that would be as fair an estimate as I could think of from my recollection of it. Your depth varies also depending on construction work that was done.

Q. Sheriff, I ask you to look at Plaintiff's Exhibit 1 and tell us what the width of the right-of-way was at the points indicated? A. 50 feet.

Q. Is that 50 feet total right-of-way or 50 feet from center to center, can you tell us?

A. It indicates 50 feet from center to center or center of the highway to the fence.

Q. So that one if the road would be probably represented by about 11 feet of blacktop and 2 feet

(Testimony of John S. Nicola.)

of shoulder and the remainder barrow pit of a 50 foot strip, is that right?

A. Yes, that would be.

Q. Would it be possible to drive an automobile or truck into one of those barrow pits?

A. That would all depend on where it was located.

Q. Pardon?

A. That would depend on where it was located and how you went about it. [135]

Q. Can you more accurately describe this wobble that you first testified to that the truck tracks, either the tractor tracks or trailer tracks indicated it made?

A. Well, I don't know if I can or not. There seemed to be a couple swings there if I recall it correctly and then gradually crossed the road. That is the best recollection I have.

Q. Did it appear to you that the truck had straightened out between those two first jogs?

A. I can't say as to that, no.

Q. Were you able to trace the path of it just back of the Sam Piel driveway, that is, south from the Sam Piel driveway?

A. Not to be definite. We thought we could but not to be definite due to this fact of traffic going in and out of the Piel driveway taking injured people to town. We found this same track a few feet south of there and traced it. There had been some traffic on that.

(Testimony of John S. Nicola.)

Q. Was traffic being stopped and turned at the Sam Piel driveway, is that the idea?

A. That is right. Nobody was allowed north of there.

Q. Did you testify that the trailer in your opinion had gone into the barrow pit during the final skid before the collision?

A. That is where it was when it was stopped. It was in the barrow pit there and had been in it for several feet. [136]

Q. And from what marks did you conclude or from what evidence did you conclude that the trailer had been in the barrow pit for several feet?

A. Well, the tracks immediately back of it and its location.

Q. Did those tracks lead right up to the trailer wheels or not? A. Yes, they did.

Q. And were there marks leading right up to the tractor wheels also?

A. They were up as far as to the point where the heat had melted them down from the rear wheels when they were burning.

Q. And how far away from the truck would you say that the heat had melted those tracks?

A. I would just have to estimate a few feet the heat had melted a spot around there.

Q. And did the marks that were made that you concluded were made by the tractors wheels stay up on the highway and shoulder at all times or did those marks go down into the barrow pit?

A. I believe what we determined to be the right

(Testimony of John S. Nicola.)

hand wheel, the right hand side of the truck and probably both the front wheels I don't believe ever got into the barrow pit.

Q. The front wheels never got into the barrow pit at all? A. It didn't appear that way.

Q. That is of the tractor?

A. That is of the tractor. [137]

Q. And the rear wheels of the tractor, did they get into the barrow pit?

A. They were sort of straddling the shoulder sort of at an angle like this. I don't know if I could explain what they looked like but that is as near as we could determine by looking at what tracks was available.

Q. Now, Sheriff, you mentioned the highway fence, I believe. Is that a fence that is strung along the edge of the right-of-way?

A. Yes, it constitutes the right-of-way fence there.

Q. And what kind of a fence is that, do you remember? A. Just barbed wire fence.

Q. Barbed wire fence?

A. My recollection of it is just barbed wire.

Q. And it is held in place by poles, is it?

A. Posts, yes. Cedar posts.

Q. In your opinion, Sheriff, would that fence be strong enough to stop a motor vehicle that ran into it with any speed? A. No, I don't think so.

Q. And did that fence extend north and south for both sides of the bridge?

A. Well, it extended north from the, from that

(Testimony of John S. Nicola.)

county road and from the right-of-way of that extending north from there.

Q. In other words, there is a gap in the fence wherever [138] there is a driveway or county road or township road or anything else? That runs pretty extensively along there? A. Yes.

Q. Sheriff, what is the condition of the road north of the scene of the accident, particularly from that irrigation hump on northward with reference to whether it is straight or crooked?

A. It is straight, generally.

Q. And for how far back is it straight?

A. I would say two miles north.

Q. And did you go to the hump that is caused by, at which this irrigation lateral is located to trace the tracks of the truck?

A. I went up to the end of where the vehicle began to make a skid.

Q. And you estimated it was back about at that hump, did you not?

A. I believe it was pretty close to it.

Q. And could you see northward on the road from there? A. Yes.

Q. And about how far would you estimate that you could see northward from that point?

A. Well, I believe that the surface of the road would be viewed for a quarter of a mile.

Q. How far? A. Quarter of a mile.

Q. Quarter of a mile?

A. There is another rise in the road. [139]

Q. And did you observe any difference in the na-

(Testimony of John S. Nicola.)

ture of the snow and ice covering, that it, that was visible on the road north of the scene of the accident from that which prevailed south of the scene of the accident?

A. We looked up and down the road there and my recollection is that there was considerable snow on the road as I remember it.

Q. And when you walked north to the place where the truck had first skidded did you observe whether or not the road was icy north of the scene of the accident?

A. No, I couldn't tell anything about the ice.

Q. Over that portion which you walked?

A. That was pretty slippery.

Q. That was pretty slippery?

A. As I said there was a lot of traffic over there prior to that and that was pretty well packed.

Q. And you observed no difference between the look of the road from the scene of the accident north as far as you walked there from a point, the north most point to which you walked and as far north as you could see?

A. My recollection is there was considerable snow on it. We looked down the road. We didn't go down to examine it. We looked to see where the tracks started and my recollection is there was some snow on the road.

Q. Now, in looking for those tracks had the snow stopped [140] abruptly any place in the next quarter of a mile down the road you would certainly have observed that fact, would you have not?

(Testimony of John S. Nicola.)

A. I don't recall any abrupt stopping of the snow. No, I don't.

Q. And you were looking at that snow for tracks?

A. Yes, we were, and looking to see where they started.

Q. Now, were there any obstructions along the side, south side, along the east side of the road that would prevent a man from driving a truck off the road and out in the field other than the fence?

A. On the east side?

Q. Yes.

A. Oh, I think it could have been done.

Q. And how about the west side north of the scene of the accident?

A. Well, that was a little deeper barrow pit over there. If I remember correctly, it is quite a little bit deeper and steeper on that side.

Q. And are there trees, some trees growing along in there?

A. Yes, there is on that irrigation ditch on the fence line there.

Q. And in your opinion, Sheriff, could a truck be, have been safely driven down into that barrow pit?

A. To the right?

Q. Yes. [141]

Q. I would hate to say on that because my recollection is it is pretty deep, pretty deep.

Q. And does that depth you recall continue on down to the county road?

(Testimony of John S. Nicola.)

A. Yes. There is farm driveway in there and another section of the barrow pit.

Mr. Lush: You may cross-examine.

Cross-Examination

By Mr. Goppert:

Q. Mr. Nicola, you have been Sheriff of Washaskie County, Wyoming, for the past fifteen years?

A. Oh, I soon will be—I am in my fifteenth year now.

Q. And you went out to the scene of this accident on the afternoon of December 27th, 1946, did you not? A. Yes.

Q. And when you got to the scene of the accident you found a bus, as I understand it one of these Burlington buses setting across the north side of the bridge across the roadway to the north of that bridge? A. Yes, sir.

Q. And the front end headed out into the roadway, that county roadway that heads to the east?

A. Yes, it was east.

Q. As I understand your statement the west end of that bus extended west of the center line of the highway U. S. No. 20? [142]

A. I think it was a little west of it.

Q. As a matter of fact it extended west to an extent that you could not pass a vehicle in behind it and the west rail of the bridge, could you?

A. That is right.

Q. To get it right down to measurements in esti-

(Testimony of John S. Nicola.)

mation wouldn't you say it extended to a distance four feet from the west side of the highway?

A. No; not if I was estimating it, no.

Q. Well, what would be your estimate from the west side of that highway to the west end of that bus?

A. I think I said before it was 6 or 7 feet from the west bridge rail to the end of the bridge to the best of my recollection.

Q. And then was it 6 or 7 feet from the west edge of the bus to the west edge of the roadway?

A. That would be a fair estimate, yes.

Q. Then the bus extended easterly from a point 6 or 7 feet from the west edge of the highway clear across that highway and from some distance down the county road?

A. It was a few feet out in the county road, yes.

Q. About how many feet would it extend east of the east edge of the highway, the front end of it?

A. Well, that would be pretty hard to tell. It was so hot we couldn't measure it and part of it was burned off at that time. [143]

Q. Well, the remains were still standing and what would you say would be your best estimate where that bus stood to the east edge of the highway?

A. Let me look at a picture here.

Q. Okay.

A. I can get it a little bit better in my mind here. There is this bridge rail right there and there is this door on the bus and the front end back in there burned off so it is hard to tell.

(Testimony of John S. Nicola.)

Q. You didn't estimate?

A. No, I couldn't. I wouldn't know exactly how many feet.

Mr. Lush: May I see that picture.

Q. (By Mr. Goppert): Now then anyway it is far enough east to cover the full length of that bus, whatever the length of it was, for the distance of 6 or 7 feet east of the west edge of the highway?

A. Yes, and took up the whole length of the bus.

Q. And if the bus was 35 feet long and the road was 22 feet wide and the rear end of the bus was 7 feet from the west edge, the front end was 20 feet east of the east lane of the highway, wasn't it?

A. That is possibly.

Q. Well, is that the way you remember the picture of the bus setting there when you came to the scene?

A. I remember it just like it is in this picture and that is just the way it was. As to the footage it was from this [144] point to that point and is purely an estimate with me.

Q. And that would be true of your estimate of the west end of the bus; that might be 3 or 4 feet from the west edge of the highway?

A. I doubt it. It could be but I don't think so.

Q. You think it was 6 or 7?

A. I would say it was approximately 6 feet from the bridge rail.

Q. Now, let's pass on to the location with reference to direction. Did I understand the bus was approximately due east and west?

(Testimony of John S. Nicola.)

A. The front end of it was just a little north of east.

Q. That is what I understood you to say, a little north of east, say a couple feet out of the way?

A. I wouldn't get down to a couple inches on it.

Q. With reference to the roadway it was a little bit to the north of east?

A. Yes, it would be a little bit north and east.

Q. And you mean then very little for the full length of the bus?

A. It would be very little, that is right.

Q. And let's pass on to get the location of the bus with reference to the closest place from the bus to the east banister of that bridge. About how far was the bus north of the east banister of the bridge? That would be the righthand side of the bus. [145]

A. The boys have it down on the report as 3 feet.

Q. Well, was that your recollection of it?

A. I would say that is about right. We walked in between after it got cooled down and we packed a couple bodies out between there.

Q. Then did you observe that the right front wheel of the bus was actually setting up on that county road?

A. It was on the dirt, yes.

Q. It was on the dirt, yes. It wasn't saddled over into the ditch, was it?

A. The right front wheel?

Q. The right front wheel?

A. Well, not to my recollection. It was right on the edge.

Q. It was right on the edge but it wasn't sagging down?

(Testimony of John S. Nicola.)

A. That road was very poor there. It was a very poor road. It slips off there and very narrow.

Q. But you observe the portion of the bus that had apparently come in contact with some other object?

A. Yes, sir.

Q. What part was it?

A. The left front corner and the bus was damaged back pretty well toward the middle along the left side it was buckled along there.

Q. It had buckled down by the time you saw it?

A. It buckled and caved in this way there. In other words [146] there was a couple big marks in it.

Q. Had the top burned out at that time?

A. Yes, the top was burned out.

Q. And the left side was swerved over?

A. No.

Q. Was turned over? A. No.

Q. It hadn't gotten into that condition yet?

A. It was just beginning to fall in, the roof when I got there.

Q. This mark you found on this bus was on the left front corner, was it not?

A. The what I found?

Q. This real damage that you saw where there had been a point of impact was on the left front corner, was it not?

A. Yes, that is the major damage.

Q. And that was caved in about how much would you say?

(Testimony of John S. Nicola.)

A. Well, I wouldn't say on that because it was all——

Q. Was it 6 inches or 1 foot or 2 feet?

A. No one could tell anything about that. The major portion of the fire was in the front end.

Q. At that time it burned down so you could not tell how much of a dent it got on the left front corner?

A. It was pretty well burned down.

Q. Now, isn't it a fact, Mr. Sheriff, that the rear wheels of that bus were duals and they never did burn in that fire?

A. That is right.

Q. Now then, let's take the next vehicle that you saw on [147] the north of that. It was the tractor portion of a semi-trailer, was it not?

A. Yes.

Q. It was a West Coast Special, is that right?

A. Yes, International.

Q. And as I understand you when you described that to the court a little while ago you showed with your right hand and pointing again with your left hand the approximate angles that those two vehicles bore to each other, did you not?

A. That is right.

Q. And as I recall it, and you tell me if this is not right, you showed the front end of the bus pointing toward the left side, I mean the front end of the truck pointing toward the left side of the bus at a point somewhere considerably in front of the rear end of that bus?

A. It was almost center.

Q. How?

A. It was almost center, probably a little back of the center.

(Testimony of John S. Nicola.)

Q. It was almost in the center but as you say the front end of the bus pointed a little back of the center of the bus?

A. The front end of the truck.

Q. I mean the front end of the truck. Now, that would be then a distance of approximately we will say 10 to 12 feet east or forward from the rear end of the bus on its left side, would it not? [148]

A. Well, it all depends on how the bus was over the rear wheels; I don't know that.

Q. And you said it was near the middle of the bus, a little to the rear?

A. I believe it was a little to the rear.

Q. Now, that bus we will just take it for granted was 34 to 35 feet long, and you mean by that description it was somewhere just to the rear of 17 feet from the rear end, or 17 feet from the front end, whichever you want, you think?

A. Well, it was back of the center of the bus as near as I remember it.

Q. Just slightly, isn't that right?

A. I wouldn't say slightly, any certain distance because I don't remember. I didn't measure it.

Q. Now then, the angle at which the point, I believe you put that at approximately one-half a quarter circle, which would be 90 degrees, and that is a quarter circle being 90 degrees, and half of it being 45 degrees, approximately that, was it not?

A. Well, there wasn't any degree or anything of the kind. It was just setting at an angle to the bus.

(Testimony of John S. Nicola.)

Q. And taking a square corner of it and just 90 degrees; would you split it in two?

A. I don't understand degrees at all.

Q. I am trying to make the sense and still get in the [149] record. You put your hand at the angle you did a moment ago and show the Judge and me just the angle and we will try to figure out what we are describing.

A. That would depend on what point at which you start for on the angle.

Q. Would you put your hands together like you did a while ago?

A. It appeared to me they were setting at about this angle.

Q. You split that thing about half way in two of a square, don't you?

A. I am going by my photograph recording here. As I remember it, Mr. Goppert, right there that is quite a little angle if you look at it this way, or if you pay attention to the front end of the truck there isn't much at all, but if you locate the rear end of the truck there is quite an angle.

Q. I don't know whether we have got the angle in the record at all but I am going to pass it on. It was somewheres between a quarter, and I mean a half of a quarter, and less than that, wasn't it? If you split, you take this envelope and that thing there is approximately one-quarter of an angle and was it approximately that angle with reference to the bus?

A. Well, it would be similar to this.

(Testimony of John S. Nicola.)

Q. You would put it down to about one-third of the quarter angle then, would you not? [150]

A. Well, I tell you I am not an engineer. All I can remember is what I saw and what I have a photograph record of.

Q. Could you draw a diagram on a piece of paper that would show the approximate angle that that one bore to the other at that time?

A. Oh, I could come somewheres close to it.

Q. You would place it somewhere between $\frac{1}{3}$ rd and $\frac{1}{4}$ th wouldn't you?

A. I wouldn't know about that $\frac{1}{3}$ rd and $\frac{1}{4}$ th business.

Q. All right. I guess we will just leave that angle undefined.

A. I have a very good picture there.

Q. You say it sets just like it does in a certain picture, does it not?

A. Yes, that is as I photographed it within five minutes after I got there. And here is another one taken from a different angle. That is rather dim. That would give you a better idea how far back of the rear end of the bus it was.

Mr. Goppert: Do you offer these?

Mr. Lush: I won't offer them but I won't make any objection if you offer them.

Mr. Goppert: I want to get the pictures in, if the court please.

The Court: All right. No objection. [151]

Q. (By Mr. Goppert): Handing you Defendant's Exhibit 2, is that a picture that you had taken

(Testimony of John S. Nicola.)

or obtained that showed the exact relative location of the truck and the bus?

A. Yes, sir, that picture was taken at my direction.

Q. Do you know who took it?

A. Dee Benson of Worland, Wyoming.

Q. Handing you Defendant's Exhibit 3, does that show the relative location of the truck and bus and the trailer on the highway?

A. That is right.

Mr. Goppert: We offer these in evidence and ask that they be received as Defendant's Exhibits 2 and 3 respectively.

Mr. Lush: No objection.

The Court: They may be received in evidence.

(Whereupon said Defendant's Exhibits Nos. 2 and 3, being photographs of the scene of the accident and equipment, offered and received in evidence, are a part of this record.)

Q. (By Mr. Goppert): Mr. Nicola, will you tell us how far the front end of that truck stood with reference to the center of the highway at the time you got to the scene of the accident?

A. In my best recollection of it the front end of the front wheels were right near the center of the oilmat.

Q. And do you mean the front end, the front wheels were both right near the center? [152]

A. Yes, approximately at, I don't know, the bumper might be a little west of the center. I

(Testimony of John S. Nicola.)

couldn't be sure but as I recall it they were pretty well in the center.

Q. Your best recollection is that very little of the bus was over on the west side of the highway?

A. No, we are talking about the truck.

Q. I mean of the truck, beg your pardon.

A. Yes, the front end of it was as I recall it was pretty well—see, it wouldn't be as far toward the center if your truck was at right angle to the road. It would be sort of being at an angle. It takes up less distance, see, so your front end as I recall it was approximately in the center of the road.

Q. Then this rear end of the trailer extended out into the barrow pit, I mean of the truck extended out into the barrow pit on the east side of the road?

A. Yes, it was on the shoulder, over the shoulder.

Q. Do I understand that the right rear wheels of the tractor of this truck were partly on and partly off the shoulder of that road?

A. Yes, they were hanging over. It is a dual tandem drive; part of them were over in the barrow pit.

Q. You observed that those wheels were 11 inch tires with 22 inch center, did you not?

A. No, I didn't. They were all afire at that [153] time.

Q. And the front ones never burned, did they?

A. No. We didn't pay any attention to tire sizes.

Q. You didn't pay any attention? A. No.

Q. Wouldn't you estimate that they were approximately 44 inches over all, each of them?

(Testimony of John S. Nicola.)

A. You mean the tandems?

Q. Yes.

A. I wouldn't know how to estimate that.

Q. Making the two tandems from front to back without any space between them 88 inches?

A. Well as I tell you I don't know what the sizes were. They could be as circular as a bicycle tire as far as I am concerned because they were all a mass of fire. I couldn't make any accurate statement on that.

Q. Yes, but that exhibit 3 shows it plainly?

A. Yes, there's some better than that. Here is your front tandem, and the rear.

Q. Those rear on the trailer never burned, did they?

A. My recollection was they did.

Q. The rear tandems on the trailer?

A. I mean the tractor. We are talking about the rear end of the tractor now, not the trailer. No, there was no damage to the rear end tires of the trailer to my recollection.

Q. I want to get your location. That tractor stood there at that angle as you gave it, whatever it was, headed kind of [154] southwest, was it not?

A. Slightly, yes.

Q. And northeast?

A. Yes, the rear end between east and northeast.

Q. And the trailer was hooked on to it with a trailer hitch right in the middle of the dual double drives?

A. I think they have what they call a turntable on there.

(Testimony of John S. Nicola.)

Q. And that is right in the middle of the dual drives, isn't it?

A. That is where it appeared to be, yes.

Q. And the trailer that was how long?

A. I don't know how long it was, 25, 30 feet, I presume from the looks of it.

Q. 25 to 30 foot trailer stuck out into the barrow pit on the east side of that roadway with its left dual tandem up on the shoulder?

A. The right ones. The left ones.

Q. Right ones, I beg your pardon. And the left ones in the barrow pit? A. That is right.

Q. Now then the over-all length of this vehicle, this semi trailer was about 40 to 45 feet long, wasn't it? A. I don't know. I didn't measure it.

Q. Did you estimate it?

A. Well I estimate it from my recollection, 25 to 30 foot flatbed trailer.

Q. The flatbed 25 to 30 feet?

A. The entire trailer. [155]

Q. And the tractor part would be about how long in your recollection?

A. Well the size of that outfit must have been in the neighborhood of 20 feet from bumper to rear end bumper.

Q. That is on the tractor portion but a part of that would be taken up in the hitch?

A. Yes, part of that length would be taken up by your trailer hitch.

Q. Possibly 5 feet or so?

(Testimony of John S. Nicola.)

A. We didn't measure the length of it. It is just a recollection.

Q. Now then you told about those fences on this roadway and the barrow pit. You are acquainted with the barrow pit coming from the south up to the bridge? A. That is right.

Q. And they are not very deep there and they are on either side of the road?

A. They get deeper as they go toward that drainage ditch.

Q. That is when you get to within 25 to 50 feet?

A. They drop down for drainage.

Q. They are not very deep by these driveways?

A. No.

Q. In fact it has been leveled up?

A. South of those driveways they did reconstruct those there. [156]

Q. Isn't it a fact the one on the south side isn't over 18 inches deep between this driveway and the bridge?

Mr. Lush: Identify "these"; I can't follow you.

Q. Between the driveway on the west side of the road and the bridge?

A. No, it is my recollection it is quite a lot deeper than that. Maybe I am not a very good judge of depth.

Q. Anyway any vehicle that went out there and went through that fence would have to jump up whatever the depth of them was on to the farm land?

(Testimony of John S. Nicola.)

A. As I say some of the barrow pits are different.

Q. And there is an irrigation ditch along this line that appears north of the bridge?

A. Yes, there is an irrigation ditch along that fence line.

Q. And doesn't it come right along those trees?

A. Well I couldn't locate it and I know it is right by the right-of-way fence. It crosses the road up north and goes under.

Q. Now then we want to back up to these tracks. You got there at about 3:00?

A. Approximately, yes.

Q. And at that time the fire had consumed the bus you say so that it had broken down between the front and rear wheels?

A. No, it hadn't broken down.

Q. Well it was sagged down?

A. It was falling through, the top was falling through [157] and going on through, yes.

Q. And you checked for tracks on the south side of the bus, that is, of the ones that the bus might, the course that the bus might have taken?

A. South of the bridge, yes.

Q. And did I understand you to say that you checked them clear to the Piel driveway south of the bridge on the south highway?

A. We followed them about as far as they were clear and they went out at that driveway.

Q. And who was with you to follow them?

A. I don't know now.

(Testimony of John S. Nicola.)

Q. Mr. Lamb go with you?

A. I don't think so.

Q. Mr. Keith Ward hadn't gotten there?

A. If it was anybody it was my Under-Sheriff.

Q. Mr. Cooke?

A. If anybody helped me it was him.

Q. You don't know for sure?

A. We were pretty busy about that time.

Q. You say we were pretty busy?

A. That is right.

Q. And what you saw as I understood your testimony here was a place out on the east side of the roadway that went practically straight from the Piel driveway to the bridge that showed dual marks, dual wheel marks?

A. That is right. That is what it was. [158]

Q. And that they cut down in the snow you showed was approximately 3 inches thick and most of the snow you said was kicked out?

A. Yes, sort of done.

Q. And they showed braking motion or action?

A. It appeared that there was braking of the vehicle.

Q. And they also showed that the wheels were sliding, didn't they? A. No, it did not.

Q. Now you recall testifying in this case once before, don't you—I mean on this question once before? A. Yes.

Q. At Worland in December, 1947?

A. That is right.

Q. I want to hand you testimony that you gave

(Testimony of John S. Nicola.)

at Worland, a copy of the testimony that you gave at Worland in December, 1947, when you were being cross-examined by Attorney J. L. Rice—you remember him cross-examining you? A. Yes.

Q. And you remember, do you not, these questions and these answers? We will start in here and I will read them. Do you need anything to help you read it? A. No, sir.

Q. Now you were handed an exhibit that was therein called P.D. 18. I will hand you that same; p is that P.D. 18? A. Yes.

Q. Do you remember seeing that exhibit at this time? A. Yes.

Q. And you remember this "X" mark?

A. I took the pictures. [159]

Mr. Lush: Your Honor, I object to identifying points on the photograph unless it is put in evidence. I mean the record will be completely blank as to what X marking is referred to or anything else.

Mr. Goppert: Handing you this picture marked Defendant's Exhibit No. 4, would you state if you took that picture? A. I believe I did.

Q. That is the same one that was marked originally as P.D. 18? A. Yes.

Q. You observe that? A. Yes.

Q. And were you then asked that you put your mark on here with an X? Do you remember marking that?

A. I initialed the mail box there.

Q. You initialed the mail box?

(Testimony of John S. Nicola.)

A. I don't know whether I put that on there or not.

Q. Now I want to read you the questions and answers. The ditch we have been speaking of extends from the point in this picture, does it not, between this here and the white house. Now that white house is the Lamb house? A. That is right.

Q. And your answer was: Yes, sir, that is right. Is that correct? A. Yes.

Q. I believe it was with reference to this picture that you spoke of skid marks extending from the point you have marked X south of the bridge?

A. Yes. [160]

Q. And didn't you answer: 'They were only clear to that point so that you could tell what they were. That means to this X point?

A. Yes, between here and there. This is the Piel driveway here, the mail box.

Q. Describe the skid marks, please?

A. They were approximately 24 inches wide and laying along the shoulder of the road. That is correct, isn't it? A. Yes.

Q. Approaching the bridge from the south they continued straight along the easterly side of the road from the X mark to the bridge?

A. Yes, sir, there were several, some partially extending part of the way on the left side but part of it had been obliterated by traffic.

Q. That was the answer, wasn't it?

A. Yes.

Q. And the next question. The skid marks you

(Testimony of John S. Nicola.)

last mention would be ones made by the lefthand wheel of the vehicle going north? And you said: Yes, sir.

Q. And that should have been "No, sir"?

A. That is a typographical error or something and is wrong because anybody would know it.

Q. That should have been righthand?

A. That is right.

Q. The next question. The one first referred to along the shoulder of the road was a mark of a wheel and that had [161] been going northerly toward the bridge? Yes, the snow pushed out and indicated that distinctly. Was that your answer?

A. Yes.

Q. Then the next question: Oh, they were the skid marks and wide mark of a wheel? Answer: Yes, in the snow.

Q. What caused them in your opinion?

A. Answer: The wheels were sliding.

Q. Did you so testify at that time?

A. They could have been sliding.

Q. That is what you saw?

A. They could slide or the brake friction could pickup the snow. They might partly slide part of the time and then run over it and pick it up again.

Q. When you were being asked that question at that time you said those wheels were sliding?

A. I think I said it appeared to be sliding.

Q. But it reads the wheels were sliding is your answer?

(Testimony of John S. Nicola.)

A. I would still say my answer is they appeared to be sliding.

Q. Now then they appeared to be sliding. If they appeared to be sliding, don't they still appear then more or less marks of sliding wheels?

A. The snow was pushed clear down to the gravel and had appearance they had been sliding and they may not have been. I wasn't there. [162]

Q. And effort was being made to stop you think and on one of the skid marks the snow was off clear down to the pavement?

A. Cut it right down.

Q. In other words, there wasn't any snow left on those marks at all?

A. Not any appearance of the marks; it didn't sweep it clean like the floor here.

Q. Those marks went for a distance as I understand you from the north side of the Piel driveway for certain possibly from south of the Piel driveway for a distance clear up to the bridge, is that right?

A. We traced them to the bridge. Yes, they were pretty well clear all the way up.

Q. Approximately 150 feet?

A. I don't know exactly how far that is. It wouldn't be any more than that.

Q. If we went south of the Piel driveway they would be 200 feet?

A. They didn't go south.

Q. You are not sure of that?

(Testimony of John S. Nicola.)

A. I am not. There was too much traffic beyond there.

Mr. Goppert: We wish to offer in evidence, if the court please, this Defendant's Exhibit 4.

The Court: It may be received in evidence.

Whereupon said Defendant's Exhibit No. 4, being a photograph [163] of scene, offered and received in evidence, is a part of this record.

The Court: We will suspend here. (5:05 p.m.) Court adjourned until 10:00 o'clock a.m. May 17, 1949.

Court resumed at 10:00 o'clock a.m., on May 17th, 1949, at which time all counsel and plaintiff were present.

Mr. Jameson: If the court please, I would like to move the admission for the purpose of this case of Mr. Jerry Housel.

The Court: Very well, Mr. Housel may be admitted for the purpose of this case.

Mr. Lush: If the court please, we have obtained permission of counsel and would like permission of the court to call Dr. Goshardt, of Worland, in order that he may testify now and return to his practice.

The Court: Very well. [164]

* * *

JOHN S. NICOLA

resumed the stand and testified as follows:

Cross-Examination

(Continued)

By Mr. Goppert:

Q. You are the same John Nicola who was on the stand yesterday when we adjourned court, were you not? A. Yes, sir.

Q. And I was interrogating you at that time concerning the skid marks or evidence of skid marks that appeared south of the bridge at the point of this collision or near the point of collision.

A. I believe that is right. [165]

Q. And I believe you had located a set of marks on the east side of the roadway leading up to the bridge from the south which we were inquiring as to whether or not they showed evidence of skid or just a braking. Did I understand you to say that your statement at Worland in December, 1947, should have been that they appeared to be, that the wheels appeared to be slipping?

A. Yes, that is what my intended answer was. There may have been an error there, I don't know.

Q. Directing your attention to the record of that deposition you were asked the question: Did you observe upon the highway any tracks approaching from Worland indicating the skid marks of a vehicle in the immediate vicinity of the accident or leading from any vehicle in the accident? And I believe you answered: There was skid marks or what appeared to be behind both vehicles.

(Testimony of John S. Nicola.)

A. Yes.

Q. That was correct?

A. That was from the bridge south I meant, yes. As I told you before it was melted on the bridge. I may have been confused as to which vehicle he was talking about, but the marks could only appear south of the bridge because the snow was all melted on the floor of the bridge.

Q. You drove out to the scene of that accident in your car as I understand it?

A. Yes. [166]

Q. And you got there by fifteen minutes to three or some such time as that?

A. I don't know exactly. I thought it was around three o'clock.

Q. About three and did you drive speedily?

A. Well, I wouldn't say so speedily. I think I drove to the best of my recollection 50 miles an hour.

Q. Going out there?

A. I thought as fast as I could, some places faster than others.

Q. And isn't it a fact you came near to piling up two or three times yourself on the way out?

A. That is correct. I hit several spots.

Q. Did you put on your brakes at that time?

A. No.

Q. In other words, you mean you skidded two or three times on your way out?

A. I skidded a little but I followed my skid and came out of it.

(Testimony of John S. Nicola.)

Q. And that happened two or three times on your way out to the scene of the accident?

A. Yes, it was corrugated road and the snow was deeper and some portions of the road the snow was packed that deep.

Q. You are holding your hands how far apart?

A. Three inches. It would pack up and get a wavy spot and clear off and you come up on one of those and hit it and it [167] would put you into a skid.

Q. You hit these waved spots on the road and it would skid you?

A. Sort of corrugated.

Q. That was just a passenger car, wasn't it?

A. That is right.

Q. When you say you came near to piling up two or three times you meant you had considerable of a skid? A. That is right.

Q. Side motion of say 3 or 4 feet?

A. Yes. I could feel it coming and then I would go with it and straighten up.

Q. You knew you were going too fast for safe driving?

A. I found it out for that particular spot right there, yes, and then I would slow down.

Q. And then you would get back up and then slow down?

A. Whatever I deemed I could make the best time. I was in a hurry.

Q. You were taking some chances?

A. I presume I was.

(Testimony of John S. Nicola.)

Q. And on part of the trip you got down as low as 30 miles an hour? A. I believe I did.

Q. Believing it was not safe in your great haste to go faster than that?

A. Yes, I probably was down to that at times. My speed [168] varied to what conditions of the road I could see in front of me; that would be the facts.

Q. When you got there had Mr. Keith Ward arrived there, the Highway Patrolman from Basin?

A. No.

Q. Did he arrive when you were there?

A. Yes.

Q. He was with you then when a part of this inspection was made?

A. Yes, he was around about there.

Q. In fact he was with you when you attempted to look for tracks?

A. I don't remember who was with me. We were looking all over with different ones at different times and I don't remember who I was with at a certain time.

Q. You don't know who was with you when you inspected for skid marks?

A. No, I don't. I thought it might have been my Under-Sheriff. I am not certain of that. I may have been alone. We made two or three trips to look at these tracks. It is awfully hard to determine anything exactly in a case of that kind under those circumstances just with one look.

Q. Now then I believe you testified that you observed or rather you gave as an opinion that you

(Testimony of John S. Nicola.)

observed something that convinced you that the brakes on the tractor on the semi had been set. Did you examine the brakes?

A. No, I didn't. There was too much fire. [169]

Q. Too much fire to say whether or not they were set or not? A. That is right.

Q. You never did make an examination of either vehicle to see if any brakes had been set?

A. You couldn't have determined that. There was no way to tell with the amount of fire. It had been consumed to such an extent when I arrived you couldn't tell that.

Q. Now that conclusion you drew about brakes being set was based entirely on the fact that you find skid marks, wasn't it?

A. Which vehicle are you talking about now?

Q. Well, on either of them?

A. Well, it did; they did have the appearance of skidding. Sometimes I have found in previous investigations that loose snow it will pick up and sort of plow it and get on top of it and pick it up again and if it has the appearance of sliding whether or not it is I can't tell. Frankly, I don't know. I have talked to drivers under those conditions and they say no, their wheels were not sliding.

Q. That is all verbal and you haven't made a test to see if it makes skid marks without sliding?

A. No, I never did.

Q. As a matter of fact, you couldn't tell whether a mark is made by a skidding or sliding wheel; you can't tell whether it was sliding forward or sideways? [170]

(Testimony of John S. Nicola.)

A. Oh, yes, you can tell if it is going sideways.

Q. Well, if it is going sideways can you tell whether or not it is doing that because of the application of the brakes?

A. Well, you can tell whether or not it is sliding or whether it has any forward motion of the wheels. If it has any forward motion conditions back of the wheels there would be some indication of it there. If there was just a straight smooth mark in my opinion it would indicate that it was sliding.

Q. And that would be true whether the brakes were on or whether it was sliding sideways?

A. I am talking about an actual skid.

Q. That is what I am talking about, either slide or forward skid?

A. If the wheels went in forward position and then you see if it was, back of it there would be some indication of it, although it was skidding sideways; if it was just a smooth mark across the ice or snow, it would indicate it had no forward motion, no traction.

Q. But the fact that there is a skid appears in the snow is it evidence whether brakes were on or off?

A. It depends on which way it was going; it could be or could not be. It is purely based on appearance.

Q. Then you base it on the fact it skidded across the [171] road?

A. And there was no sign of any forward motion or traction. In other words, any heavy tire, even a

(Testimony of John S. Nicola.)

car or anything else, if there is any forward motion would leave a mark if skidded sideways.

Q. If it could get through the ice?

A. Yes, if in the ice or dirt or weeds there would be some signs of the forward traction power of the wheels.

Q. Now so far as this skid track south of the bus was concerned south of the bridge that was only a dual set of tracks that showed skid marks in the skidding forward and they extended from the Piel driveway to the bridge south of the bridge, did they not? A. Yes, approximately that.

Q. And you couldn't tell from looking at those whether they connected up with this bus or whether they were made by some other vehicle that had recently traveled that highway before the accident, could you?

A. The snow and ice was melted off the floor of the bridge. We traced them up to the bridge and due to the size of them and the apparent dual there and the freshness of them we figured they were the tracks of the bus, yes.

Q. But they could have been made by any other vehicle that was equipped with duals, could they not?

A. That I couldn't say. I don't know whether they could [172] or couldn't.

Q. In other words, you couldn't be sure they were the bus tracks?

A. We could tell as nearly, we could tell they were the tracks made by the bus and from talking

(Testimony of John S. Nicola.)

with people afterwards who stated they were on the shoulder of the road.

Q. You apply part of your testimony then to what you got from other people?

A. Well naturally, to try to support the position of the bus.

Q. Well now, those tracks extended over on to the shoulder of the highway, did they not?

A. They were pretty well out, yes.

Q. And had they gone straight forward they would not have gone across the bridge without some turn, would they, to the left?

A. No, wouldn't say that. I think they would have went on through there all right. They weren't hanging on the edge of the shoulder.

Q. I know, but they were out on that two foot shoulder, weren't they?

A. I wouldn't say exactly taking up the two foot shoulder. They might have one tire on the pavement and one on the gravel.

Q. That would be about a foot on the shoulder and a foot on the pavement?

A. I don't know exactly. [173]

Q. You won't place them for certain?

A. No, you can't place the shoulder of the highway down to inches, Mr. Goppert. You can't do that too exactly because there is variation.

Q. Well, they would have gone across the bridge if they went straight forward to the bridge, giving the right banister a close shave, wouldn't they?

A. It might be pretty close, yes.

(Testimony of John S. Nicola.)

Q. Now going to the north side of the bridge, did you make an examination, and if so what did it consist of of skid marks north of that bridge?

A. We tracked them back from the vehicles.

Q. Now let's get it down to what you did?

A. Well, yes.

Q. Not what somebody told you?

A. Nobody told me this now.

Q. Now how far north did you go?

A. I am confining, testifying to what I saw.

Q. What?

A. I am testifying to what I saw of it personally.

Q. How far north did you go?

A. I think as near as I can recall about up where that drainage ditch is and so-called hump in the road.

Q. Isn't it a fact you never went north of the north edge of the Lamb driveway? [174]

A. No, that is not a fact. We walked all around up there, Mr. Goppert; all around over that highway. I wouldn't say how far up there we did walk. We might have gone up there two or three hundred yards or maybe two hundred feet.

Q. Now you have testified in regard to that matter before?

A. I think I was asked about it.

Q. And asked specifically concerning how far you made that examination? A. Yes.

Q. And I want to read this to you and let you read it yourself from page 11 of this deposition: Going back to the afternoon of the 27th of Decem-

(Testimony of John S. Nicola.)

ber, 1946, did you observe the highway on the north side of the bridge? Answer: Yes, sir.

A. Yes.

Q. Mr. Nicola, will you say whether or not you found upon that highway any skid marks which went from the west side to the east side of the road?

A. Yes.

Q. Your answer: Yes, sir, there was what appeared to be skid marks.

Q. You so testified, didn't you? A. Yes.

Q. Could you describe or will you describe them, please? And here is your answer, I believe: Well, the best I can, yes. There appeared to be skid marks, two lines of them of course, starting on a slight curve and curving over to the east side of the highway and then just along the shoulder where there was only one left. [175]

A. That is right.

Q. One had run out and they were traced up to the trailer of the truck which was there.

Q. Did you so testify at that time?

A. Yes. One of them had run out into the barrow pit off the highway.

Q. And they were traced up to this trailer of the truck which was there. Did you so testify at that time? A. Yes.

Q. Those tracks did go to the trailer or truck, did they?

A. They went to the truck and trailer both.

Q. Read this again.

(Testimony of John S. Nicola.)

A. This is the rear set of tracks I am talking about now.

Q. These tracks that I refer to now were traced up to the trailer. There was also tracks traced up to the rear end of the truck.

Q. Did you so testify at that time?

A. No, I referred to the tracks of the trailer, two sets of tracks.

Q. Now let's follow on through what you did testify at that time: The trailer of the truck that you refer to was that the trailer that was attached to the West Coast Special that was on the highway at the time of the accident? Your answer was: Yes, sir.

Q. Is that correct? A. Yes. [176]

Q. On which side of the highway was this West Coast Special truck and trailer when you arrived?

A. On the east side.

Q. Did you so testify? A. Yes.

Q. You remember testifying very well, I mean very clearly that you did testify in regard to all this matter at that time, don't you?

A. To the best of my recollection I gave what I thought was the proper answer.

Q. And directing your attention to questions and answers on page 12: Q. And what have you to say as to whether or not the highway to the north of the bridge had snow or ice upon it? Answer: It did.

A. Yes.

Q. And for a distance of 150 to 200 yards was

(Testimony of John S. Nicola.)

that a fact? Answer: In various places, yes. It was not solid snow.

A. Yes, that is right.

Q. You so testified at that time?

A. It was partly covered with snow, yes. There were places where the traffic whipped it off.

Q. And you remember being cross-examined in regard to that same matter on page 13 of that deposition, do you not? I want to read this to you and ask you if you so testified at that time in response to these questions: [177]

Question: On your way out you observed a very slippery condition of Highway 20?

Answer: Yes, it was snowy and slippery.

Question: There was ice on top of the road and snow on top of that?

Answer: Yes, from all appearances that was what it was.

Question: That covered the entire roadway south of the accident, did it not?

Answer: That is my recollection.

Question: It was a solid covering on the highway?

Answer: It was not solid, there were stretches where it was off.

Question: 500 feet from the scene of the accident it was solid coating of ice and snow?

Answer: As I recall it, it was pretty solid.

Q. That is, we were talking about the south and then we go on page 14 to the north? A. Yes.

(Testimony of John S. Nicola.)

Q. You so testified in regard to that part, the part that I have already read, did you not?

A. Yes.

Q. Then you were asked this question:

Question: And then did you make an inspection of the highway north of the scene of the [178] accident?

Q. And didn't you answer: Just for a short distance.

A. That is right, referring to where we went to look for the tracks.

Q. All right, we will just see how far you went in the next question:

Question: Did you make that far enough north to find that there was no snow on the highway from a point 300 feet north of the scene of that accident?

Answer: No, I didn't go that far, I had no occasion to.

Q. Did you so testify at that time?

A. I was estimating the distance I went. There had been no measurements made at that time. So far as I remember it could have been 200 feet or 300 feet or up to that hump.

Q. I am going to ask you some more about this:

Question: Didn't you have occasion to observe that the highway was clear north of the spot?

Answer: No, I didn't make any trip down there at all.

Q. Is that true? A. That is right.

The Court: Just answer it. Did you testify that

(Testimony of John S. Nicola.)

way? And then you can explain it on examination of your own counsel.

A. Yes, I did at that time.

Q. And then you were asked on page 15 this question: [179]

Question: I believe you stated you did observe tracks that approached the scene of this accident from the north that you followed up to the rear end of the trailer that was being pulled by this tractor?

A. Yes.

Q. Did you answer:

Answer: Yes, there were some skid marks angling across the road.

A. Yes.

Q. And then you were asked the question:

Question: Isn't it a fact that there were 57 paces approximately 57 yards long?

Q. And didn't you answer:

Answer: I believe the Highway Patrolman said around 150 feet as near as he could tell.

Q. Did you so testify at that time?

A. Yes.

Q. Now that Highway Patrolman was who?

A. I don't remember who.

Q. It was either Keith Ward or Mr. Wickam?

A. It was either one or the other.

Q. And Wickam got there last?

A. Yes, Wickam was there last.

Question: You didn't measure them yourself?

Answer: No, I didn't measure them. [180]

A. That is right, I didn't measure them.

(Testimony of John S. Nicola.)

Q. And then you were asked this question at that time:

Question: You made no investigation of the road over a distance of approximately 200 feet north of the scene of this accident?

Q. And didn't you answer:

Answer: No, I had no occasion to do anything else.

A. I think that was my answer to your question at the time as I understood it, yes.

Q. Now isn't it a fact, Mr. Nicola, that you didn't choose to investigate to exceed 200 to 300 feet north of the scene of that accident?

A. As I tell you we investigated up to as far as we could trace where the truck started to get into trouble; whatever distance that was I do not know because we didn't measure it.

Q. Now isn't it a fact you only walked to the track that went across the road and you said it was approximately 150 feet long as given you by the highway patronman? A. That is right.

Q. And that is the only track you followed?

A. That is the only skid mark.

Q. On the north side?

A. That is all we were doing was investigating skid marks, yes. [181]

Q. And now you testified yesterday you saw some wobbles in the track you investigated, was it in that 150 feet?

A. Well, it must have been.

(Testimony of John S. Nicola.)

Q. In other words, there was wobble in the track that went across the highway?

A. Yes, it was all a continuous wobble and a skid.

Q. A continuous wobble in the skid?

A. Yes. They were all connected together naturally.

Q. Will you tell me what kind of looking thing that track was?

A. No, I couldn't tell you that.

Q. You couldn't? You had some pictures taken out there, didn't you?

A. Yes, I asked the boy to take some.

Q. Will you present the ones that show the tracks?

A. No, they didn't show. He had his camera in very poor focus and they didn't show.

Q. Handing you this picture which you will observe has some track marks on it and their position, and observing the truck and the bus with some people standing around the back of the bus, does that refresh your memory as to the tracks you saw there that day?

A. Well, that looks very much like them, yes.

Mr. Goppert: We would ask that this be marked as Defendant's Exhibit No. 5. [182]

Q. Handing you Defendant's Exhibit No. 5, that is the picture, is it not, that you said showed the tracks that looked very much like you saw right after the accident?

A. As I recall.

Q. Now on the right-hand side you observe the

(Testimony of John S. Nicola.)

driveway that goes into the ranch house on the west side of the road north of the bridge? You observe that? A. Yes, I think that is.

Q. Which you recognize those tracks the curve started north of that driveway?

A. As I recall it they did.

Q. The fact is didn't they start approximately at the west end of the Lamb driveway?

A. I believe it was in that neighborhood. I can't tell you definitely.

Q. You didn't mark it by any natural object?

A. No. We tried to pick out where the skid marks started and wanting to take a good mark that was in a skid.

Q. Don't you remember they started approximately where there was a clump of trees on the west side of the road right there by the Lamb driveway; that is where the thing started swerving across the road?

A. That could be approximately right. I don't remember so many trees on that.

Q. This is a pretty good picture of it, it shows the [183] truck and bus afire there, doesn't it?

A. Yes.

Q. You can see the fire on the wheels, the tires rather?

A. I would like to know at what distance he was from that. That would be quite a ways.

Q. That would probably be 200 or 300 feet from the scene of the accident, wouldn't it? I believe, Mr.

(Testimony of John S. Nicola.)

Nicola, that it was approximately 200 feet from the accident north right on the road.

A. Well, if it was we were considerably north of that looking for tracks if this is 200 or 300 feet.

Q. Handing you Defendant's Exhibit No. 6, now that is colored and that is off of the kodachrome film, and that gives exactly the same picture as this No. 5 you recognized as such, you recognize it as such, do you not?

A. It appears to be the same picture.

Q. And it shows also the same marks going across the roadway from the west to the east?

A. Yes.

Q. And shows two different ones almost parallel, does it not? I mean running about the same distance from each other clear across?

A. It is going across at an angle, yes. It went into the barrow pit closer to the bridge than I thought.

Q. Now then, Mr. Nicola, you remember seeing those two tracks that angled across from the west side of that roadway [184] to the east side, do you not? A. Yes.

Q. And they were approximately the same distance apart all the way, weren't they?

A. My recollection of it was there was two skid marks there with a big curve in it.

Q. Yes, that had a big wide curve in it, didn't it? No short, sharp curve?

A. I can't describe just what it appeared to be,

(Testimony of John S. Nicola.)

but it appeared to me one of those had a big curve in it.

Q. Isn't this a good picture of them?

A. It is not too clear. It is not what I call a good photograph at all. It is not sharp; however, it is a fair picture.

Q. You couldn't describe any better curves than that shows on those pictures 5 and 6?

A. Down here, if I recall it right, right here is where the wider hook in this curve, this skid.

Q. You are pointing there right to the, near the rear end of the tandems, that is, the rear end of the truck?

A. That is what I mean, the dual tandems.

Q. Now isn't it a fact those two tracks are the ones you traced up, as you testified down at Worland, to the rear end of the trailer?

A. Well, those are the tracks, that is right, but if I said the trailer, I meant the rear end of the truck. [185]

Q. You think that should be corrected to show the rear end of the truck?

A. Absolutely. I probably got confused with the question. Not the trailer because they don't make that kind of track.

Q. You were asked down there two or three times whether or not it was the trailer and you testified it was the trailer?

A. This mark appears in this picture appears very plain as being the drive wheels of the truck

(Testimony of John S. Nicola.)

and those are the two skid marks I am referring to. If I said the trailer——

Q. Now then there were no other skid marks on the north of this scene of the accident other than those two, were there, that you observed that afternoon?

A. I don't recall anything more than that.

Q. These two?

A. Just those two that appear to be skids.

Mr. Goppert: We want to offer in evidence Defendant's Exhibits Nos. 5 and 6, respectively, and ask that they be received as 5 and 6.

Mr. Lush: No objection.

The Court: They may be received in evidence.

(Whereupon, said Defendant's Exhibits Nos. 5 and 6, being photographs of the scene of the accident, offered and received in evidence, are a part of this record.)

Q. There was no other separate set of skid marks going across that road that you could observe anywhere on the north [186] side of the scene of the accident? A. I don't recall any but those.

Q. You remember, do you not, reading your deposition at Worland after it was given?

A. I think I did.

Q. And you read that in the office of E. M. Conant, the County Clerk there, did you not?

A. I don't remember whose office.

Q. And these statements which I read to you were read by you at that time, were they not?

A. I think that is correct.

(Testimony of John S. Nicola.)

Q. And the deposition you gave it bears your signature, doesn't it?

A. Yes. I should have read it more carefully.

Q. You think you should? A. Yes.

Q. And you swore to it before them at that time?

A. To the best of my belief is what I signed, yes.

Q. I see here Mr. Conant says you signed this up after it had been submitted to the witness and was read by him; he put that in there in his own handwriting, didn't he?

A. I don't know whose handwriting it is.

Q. Isn't that Mr. Conant's?

A. I don't know.

Q. Well, he certifies to it?

A. I don't know whose handwriting that is. I know Mr. Conant's signature and that is all. [187]

Q. Did you ask anyone else to check up on those tracks?

A. I seem to recall asking somebody to come with me to look at those tracks.

Q. Who was it?

A. I seem to recall to say to somebody, "Let's go and look at those skid marks."

Q. That was an officer, was it not?

A. I believe it was. There could be two or three people there; frankly I don't remember.

Q. It could have been Mr. Ward, couldn't it?

A. It could have been he or Mr. Wickam or anyone of them.

Q. Did you ask Mr. Martin Lamb to go measure the tracks and check up on them?

(Testimony of John S. Nicola.)

A. I seem to remember asking somebody, but frankly I don't remember.

Q. You are not trying to testify here as to what his report was to you, are you, from his investigation?

A. No, sir. I testified to what I saw and what it appeared to me to be the best of my recollection.

Q. And that is what you were testifying to in December, 1947, were you not?

A. I testified to what I thought was the proper answers to the questions as I understood them.

Q. And when you were asked the question about how far north you went you said 200 to 300 [188] feet?

A. I estimated the distance, but now I find it was possibly farther.

Q. And you couldn't tell about any track back north of that 150 foot track? A. Personally.

Q. And is your memory better now than then?

A. I don't know. I don't think so.

Q. You think you were better then than now?

A. I don't know.

Q. Isn't it a fact that you were so busy taking care of the injured and taking bodies out and so on that you didn't take much time to check up on anything?

A. We took a short amount of time after we got organized. I will admit it was short. We done the best we could.

Q. And you didn't do the checkup until you had the people taken care of? A. Yes.

(Testimony of John S. Nicola.)

Q. You checked up before that?

A. We checked up roughly before that and went and rechecked again after we determined we couldn't get in the bus.

Q. Isn't it a fact vehicles were being shunted around the scene of the accident through that driveway?

A. Yes. They were very light vehicles.

Q. Was there a bakery truck came skidding down there into the scene of the accident?

A. I have no recollection of that. [189]

Q. You don't remember that?

A. No, I do not.

The Court: We will take a recess until 2:00. (12.05 p.m.)

Court resumed pursuant to recess at 2:00 o'clock p.m. on May 17, 1949, at which time all counsel and plaintiff were present.

Mr. Lush: The plaintiff calls John Nicola for redirect.

Redirect Examination

By Mr. Lush:

Q. Mr. Nicola, you testified on cross-examination I believe that you drove about 50 miles an hour as a maximum speed coming from Worland to the scene of the accident?

A. Part of the time, yes.

Q. And I believe you testified that you skidded some in so doing, is that right?

A. Yes, two or three times.

(Testimony of John S. Nicola.)

Q. And what did you do to take yourself out of the skid when you started to skid?

A. Well, I just went with it.

Q. What do you mean you went with it?

A. Well, went with the direction I was [190] skidding.

Q. What?

A. Just go with the direction I was skidding and apply a little more power.

Q. And how did you go in the direction you were skidding, you mean you turned your wheels in that direction?

A. Your front wheels, yes.

Q. Turn your front wheels in that direction?

A. Yes.

Q. Did you have any trouble taking yourself out of skids doing that?

A. No.

Q. And you didn't go out of control at any time?

A. No, I did not.

Q. Did you apply your brakes at any time you were skidding?

A. No.

Q. Why not?

A. Well, it's too slippery. I was afraid to, I presume.

Q. If you did apply your brakes do you know what would happen when you were in a skid?

A. I think I would have probably went any direction then, I don't know.

Q. Would you lose control of your vehicle under those circumstances?

A. You would be very apt to.

Q. From your experience as a peace officer and

(Testimony of John S. Nicola.)

from the examinations you have made of the scenes of accidents, from your knowledge of the road conditions going north out of [191] Worland on that particular day and from all the particular information you have received with reference to the conditions that existed on that date, do you have an opinion as to what would be a safe speed driving north out of Worland?

A. Well, I would say not over 40 miles an hour.

Q. And when you say 40 miles an hour, to what type vehicle do you refer?

A. Well, I would say most any type.

Q. Now I believe you testified on cross-examination of the skid marks of the tractor; you had examined the skid marks of the tractor after it passed Martin Lamb's driveway?

A. Yes, we examined them.

Q. And if I remember correctly you said it appeared that those wheels were not revolving at the time that those skid marks were made?

A. That is the opinion that I formed, yes, sir.

Q. And that opinion was based on your examination of those marks, was it? A. Yes, sir.

Q. Now I believe you testified extensively about one set of tire tracks that were made by the, that you believed were made by the dual wheels of the bus that ran from about Sam Piel's driveway to a point south of the bridge? A. Yes, sir.

Q. Were you able to identify the corresponding tracks of that bus out on the road? [192]

A. In this way: there would be a few feet of

(Testimony of John S. Nicola.)

another pair of duals visible and then there would be a few feet where it wouldn't be visible, and then again there would be a few feet part of them were clomped out.

Q. And from your examination of the marks, the tracing of the marks such as were visible did you reach any conclusion as to whether or not the brakes were ever locked on Brownell's vehicle?

Mr. Goppert: That is objected to as calling for a conclusion of the witness, if the court please.

The Court: Well, I don't know; if he has some reason to give why he thinks the brakes were locked or were not locked, let him give them. Question him in regard to it and see what his knowledge is and see whether from his knowledge concerning such things he can make that deduction.

Q. (By Mr. Lush): Sheriff, what was the nature of the marks that you observed out in the road, that is, the corresponding set of duals in the road where you could see them?

A. Well, they were on more packed snow being farther to the left; they were on snow that was partly packed and they appeared to be rolling.

Q. Did they cut through to the blacktop at any place that you observed?

A. I don't recall that they ever cut through, no. [193]

Q. Did you observe anything else that would indicate to you whether or not the wheels on Brownell's vehicle were locked at any time?

(Testimony of John S. Nicola.)

A. How was that again?

Q. Did you observe anything else about the marks that would tell you whether or not the wheels of Brownell's vehicle were locked at any time?

A. Well, from what I could observe they didn't appear to be, no.

The Court: Well, now you see he hasn't given any reasons for the exposition of those opinions; that is, there isn't proper foundation laid there for him to say whether the wheels are locked or were not locked.

Mr. Goppert: If the court please, I want to move the answer be stricken as a mere conclusion.

The Court: Yes, I will grant the motion.

Q. (By Mr. Lush): Now, Mr. Nicola, on cross-examination I believe your estimates of the distances were challenged, is that correct?

A. I presume. Yes, I think so.

Q. Now assuming that the distance between the middle of the drainage ditch and the Martin Lamb driveway is approximately, is exactly 250 feet, how far north of the scene of the accident would you say that you walked in the examination of tracks? [194]

A. To the best of my recollection it is up near what is now marked as lateral or hump in the road there.

Q. Up that far?

A. Well, wherever that is.

Q. This point. And if it is 425 feet from the bridge to the lateral, would you tell us then by that you walked approximately 425 feet?

(Testimony of John S. Nicola.)

A. Well, as I said before I was estimating before and it must have been that far; to the best of my recollection we were up on that hump so-called which lies in the road. I done a poor job of estimating, apparently.

Q. And when you had walked that far north you did look on down the road; did you not look north down the road?

A. Yes, we were looking here along on the sides north and south.

Q. And you observed no substantial difference in the road north of the scene of the accident, or rather north of the lateral, irrigation lateral and south of the lateral with reference to ice and snow?

A. The ice I couldn't say about. As I recall it there was considerable snow on the road. The ice would be underneath and, of course, we didn't dig down underneath.

Mr. Lush: That is all. [195]

Recross-Examination

By Mr. Goppert:

Q. You couldn't see the ice under the snow until you got the snow kicked off of it, could you?

A. No, you couldn't have seen any ice, not from the top.

Q. Now then you backed up a little on me. I thought you were correct this morning when you testified, or maybe it was last evening, that those wheels were sliding, the bus wheels, where I am

(Testimony of John S. Nicola.)

calling your attention to the testimony you gave at Worland in December of 1947. You did say at that time, as I understand you corrected your testimony from what it says here. This says—you answered then when I was asking you what caused the marks, you said the wheels were sliding and you said you should have said they appeared to be sliding?

A. That is what it should have been if I have my best recollection.

Q. Whether it was one or the other there was evidence that convinced you that the wheels appeared to be sliding?

A. Now just a minute. On this soft snow they had that appearance. The left of the bus what little we determined——

Q. The left?

A. Yes, it would be the left-hand side.

Q. The right-hand side is the one you are talking about?

A. I know that. I said that was in loose snow and it [196] picked it up, plowed it out along there, and I thought my answer should have been on it was that they appeared to have been sliding.

Q. Well, you were asked the question this way: There were the skid marks and wide marks of a wheel? Your answer: The wheels were sliding.

A. I think I should have or meant they appeared to have been sliding; I still think that is the answer I made.

Q. Well, whether they appeared to be sliding or

(Testimony of John S. Nicola.)

were sliding it still was only what you saw on the ground that got you that opinion, wasn't it?

A. Absolutely nothing else to go by.

Q. Now then I think I understood your testimony this morning that the only tracks, the only skid marks on the north side of the road that you saw are these that are depicted on Defendant's Exhibit 5, two of them parallel angling to the southeast?

A. Yes, that would be southeast.

Q. There wasn't a third track between them?

A. Not to my recollection.

Q. There was just those two and they were approximately the width?

A. Big wide marks.

Q. Each one of them was a pretty wide mark, wasn't it?

A. Yes, they were. [197]

Q. And they ran approximately parallel and there was nothing, there was no third mark out there beside of them anywhere, was there?

A. I don't recall any excepting just a big wide——

Q. And they were approximately the width apart of two sets of wheels on a truck or a trailer?

A. To the best I remember, yes.

Q. And those appeared to be sliding?

A. Yes.

Q. And side swerve sliding, wasn't it, not rolling forward?

A. Yes, they were going sideways across the road, the track.

Q. And you do remember you testified at Wor-

(Testimony of John S. Nicola.)

land that they were the trailer tracks, that you traced them to the trailer wheels?

A. There was a track to the trailer wheels.

Q. You testified at Worland you traced these tracks that went across the road to the trailer wheels? A. That is right.

Mr. Goppert: That is all.

The Court: Any further examination of this witness?

Re-redirect Examination [198]

By Mr. Lush:

Q. Was that a correct statement that you made in your deposition that you traced those to the trailer?

A. The trailer wheel had made a track.

Q. The trailer wheel had made a track?

A. Yes.

Q. And had the tractor wheel made a track?

A. Yes.

Mr. Lush: That is all.

RONALD E. WHISTON

was called as a witness for plaintiff, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lush:

Q. Will you state your full name, please?

A. Ronald E. Whiston.

Q. Where do you live, Mr. Whiston?

(Testimony of Ronald E. Whiston.)

A. 866 North 12th Street, Laramie, Wyoming.

Q. What is your occupation?

A. I am an engineer.

Q. And calling your attention to the date of December 27th, 1946, I will ask you were you a passenger on a bus that was involved in an accident on that date? A. I was.

Q. And did that accident occur about 9 miles north of Worland, Wyoming? A. Yes.

Q. Where were you seated in the bus before the accident? [199]

A. My wife and I were seated in the first seat behind the loading door. That is on the right-hand side of the bus.

Q. Were you next to the window or was she?

A. No, she was.

Q. And you were next to the aisle?

A. That is right.

Q. And during the course—where did you get on the bus?

A. Well, I eventually went out the door.

Q. Where did you get on? A. At Casper.

Q. At Casper, and after the bus had passed Worland did you have an opportunity to observe any of the instruments on the dashboard from time to time? A. Yes, I did.

Q. And what instruments were you able to observe?

A. Well, I realized that the roads were slick and my wife was a little nervous and I made a special effort to look at the speedometer now and then.

(Testimony of Ronald E. Whiston.)

Q. And what speed or what speed was shown by the speedometer when you observed it coming north of Worland?

A. Well, about the time I looked at it he was between 30 and 35 miles an hour.

Q. Did you ever observe by any means other than the speedometer that the bus was going faster than 35 miles an hour? A. No, I didn't.

Q. Now just before the accident occurred there was an [200] application of the brakes of the bus, was there not?

A. Well, I couldn't really say whether or not there was application of the brakes or not; all I knew the bus was slowing down, but whether he was using compression or brakes I couldn't tell.

Q. And did you observe the speedometer at the time you first noticed that slowing down action?

A. Well, sort of; yes, I did.

Q. And do you remember what the speedometer reading was about that time?

A. Well, it seemed to me just shortly before the impact the speedometer reading was around 20.

Q. And when the bus first started to slow down back from the point of impact did you notice what the speedometer reading was then?

A. Well, when I first noticed the slowing down of the bus he was going about 30.

Q. Did you notice whether or not the bus skidded as it was slowing down?

A. As far as I could tell the bus never skidded at all.

(Testimony of Ronald E. Whiston.)

Q. Did it deviate from a straight line?

A. Well, I was under the impression at one time he might have started to turn to his left, but whether it deviated from a straight line or not I don't know.

Q. And just before the impact was there any deviation [201] from a straight line?

A. Yes, the driver tried to turn the bus shortly to his right.

Q. And you observed him do that?

A. Yes.

Q. And did he take any other action prior to that?

A. Just prior to the impact he opened the door.

Q. Now did you observe the movements of the vehicle that was approaching from the opposite direction?

A. Yes, I did.

Q. Are you now familiar with the scene and landmarks of the accident?

A. A little more so than I was at the time.

Q. Calling your attention to Defendant's Exhibit No. 5, this roadway shown on the right has been identified as the driveway leading into the ranch on the west side of the road; do the tracks shown there give a fair representation of your recollection of the path of the oncoming vehicle from that point down to the point of impact?

A. Yes, it looks similar to what I would think the vehicle would have made.

Q. And did you observe the movement of the vehicle before it reached, this oncoming vehicle before it reached that point?

A. Yes, I did.

(Testimony of Ronald E. Whiston.)

Q. And what was the movement of the oncoming vehicle?

A. Well, when I first noticed it I didn't pay particular [202] attention to it. He was traveling in a straight line on his own side of the road; however, I started paying more attention to it when he made a swerve or a skid it appeared to me to be coming over on the bus's side of the road, and from then on I watched him very closely.

Q. Did he appear to straighten up after that first skid?

A. After the first swerve he got over on what appeared to me to his own side of the road and went in a comparatively straight course for a short ways.

Q. And did he swerve then again before the first skid indicated.

A. Yes, he swerved a second time even more so than the first time.

Q. And were those swerves to the right or left, to his right or left of the oncoming vehicle?

A. To the oncoming vehicle's left.

Q. Then would the picture, this photograph give a fair representation of the path of the third swerve that the vehicle made?

A. Yes, I believe so.

Q. Can you place the position of the bus when you first noticed that it was slowing down by any of the landmarks?

A. No, I can't. I didn't look out at any time to know just exactly where the bus was.

Q. Can you place the position of the truck com-

(Testimony of Ronald E. Whiston.)

ing from the north by any of the landmarks [203]
north?

A. Yes, it was just about crossing the irrigation lateral.

Q. Did you walk around the scene of the accident after it was over? A. No, I didn't.

Q. Do you know what the road condition was coming north from Worland?

A. Well what little I did walk around I walked from the bridge south to the car which took me into Worland. The road was very icy.

Q. Now you testified, you gave testimony in a case involving this same accident, did you not?

A. No, I have only given a deposition.

Q. In that deposition you made certain estimates of distances and so on and so forth?

A. Yes, I did.

Q. And those were purely estimates of distances, were they not? A. Yes.

Q. Do you remember how far apart you said these vehicles were when you started to skid, when the truck started to skid?

A. I believe I said something about 300 yards. I am not sure. I would have to look at it again.

Q. Now assuming that the distance between the north end of the bridge and the irrigation lateral is about 425 feet, could you now estimate just about how far apart the vehicles were?

A. It would be 200 or 250 yards probably then.

Q. So you put it at 750 feet, is that right?

A. Yes. [204]

(Testimony of Ronald E. Whiston.)

A. And if the truck was 425 feet north of the bridge at the time it started to swerve, then your best estimate now would be that the bus must have been less than 350 and probably not less than 200 feet short of the bridge?

Mr. Jameson: We object to that as leading question, if the court please.

Mr. Lush: It is a mathematical computation from what he said is what it is. I will withdraw the question, your Honor. That is all.

Cross-Examination

By Mr. Jameson:

Q. Mr. Whiston, as I understand it you and your wife got on the bus at Casper?

A. That is right.

Q. And what time was that, if you recall?

A. About 9:00 o'clock in the morning.

Q. And up to Worland did you travel about on schedule, do you recall?

A. I don't recall. I believe we were a little late in Worland.

Q. How late in Worland?

A. I couldn't say.

Q. What was the condition of the highway south of Worland?

A. As I remember it a few miles south of Worland it was [205] spotty ice, up to that point the road appeared to be good.

Q. And where did the ice start, what distance south of Worland?

(Testimony of Ronald E. Whiston.)

A. It was spotty all the way into Worland.

Q. From what point.

A. I couldn't give any definite distance; it must have been two or three miles.

Q. But beyond that the highway was clear, was it clear of ice? A. Yes.

Q. And then between Worland and the scene of the accident it was pretty solid ice, was it?

A. Yes, it was.

Q. I believe you mentioned that you had looked at the speedometer on one occasion? A. Yes.

Q. Was that between Worland and——

A. Well it was all the way from Casper.

Q. How many times do you suppose you looked at the speedometer?

A. I couldn't give you any idea. I haven't any recollection.

Q. And between Worland and the scene of the accident did you look at the speedometer a number of times?

A. Yes, as I remember it it would be probably three or four times.

Q. That is in a distance of 9 miles?

A. Yes. [206]

Q. Why did you do that?

A. Well my wife was a little nervous and so was I and I just wanted to check and see what the speed was.

Q. What caused you and your wife to be nervous?

(Testimony of Ronald E. Whiston.)

A. The fact that the roads were icy and we were in sort of a rush to get to our destination.

Q. Now you last looked at the speedometer at what point?

A. Well as I was looking at the truck I was looking at the speedometer at the same time, and I couldn't give you any.

Q. Do you recall on that point, Mr. Whiston, testifying in your deposition taken in October, 1947?

A. I don't recall exactly what I said without reading it.

Q. Calling your attention to the deposition, page 7, were you asked this question? You glanced at the speedometer? And did you answer: I did?

A. I did.

Q. And then were you asked this question: And was it less than 30 miles per hour? And did you answer: The last time I looked it was 30 miles, which was just before the bus got to the bridge I would say?

A. Yes, I did.

Q. Is that correct?

A. As far as I could tell, yes.

Q. So just before you got to the bridge it is your best estimate you were traveling 30 miles an [207] hour?

A. I never knew the bridge was there but I imagined it was just then.

Q. Pardon?

A. I never really noticed the bridge so that was just about as good an answer as I could make. I

(Testimony of Ronald E. Whiston.)

don't know whether we were close to the bridge or far.

Q. Now, Mr. Whiston, when you first observed the truck coming from the north at what point was the bus? A. I don't know exactly.

Q. Would you say it was about equi-distant from the bridge?

A. That was my impression at the time.

Q. Your impression at the time was that the truck and the bus were equi-distant from the bridge?

A. Well as I said I didn't know exactly where the bridge was at that time but that was my impression later.

Q. And did you think they were going to pass on the bridge? A. No.

Q. You did state, did you not, in your deposition that you estimated they were both about the same distance from the bridge? A. I did.

Q. And both of the vehicles were traveling then about the same rate of speed?

A. It appeared to me they were.

Q. Now I believe you testified on direct examination, [208] Mr. Whiston, that it was your impression that the bus pulled to the left at some point after you first observed the truck?

A. It was my impression when the truck made its second swerve across the road it looked like it was over on the bus's side of the road and that the bus did start to pull to his left in order to miss him.

Q. And at what point was that with reference to the bridge?

(Testimony of Ronald E. Whiston.)

A. I don't recall right now. It was completely south of the bridge.

Q. Would you say between 30 and 50 yards?

A. Well I really couldn't say. I can't recall just exactly where it would be.

Q. You did make that estimate, did you not, in your deposition? A. I did at one time, yes.

Q. And of course do you recall now whether the bus went over to the west side of the highway at any point? A. No, I don't believe he did.

Q. Now do you recall testifying on that point at the taking of your deposition? A. Yes, I do.

Q. Calling your attention to page 7 of the deposition, Mr. Whiston, were you asked this question: You observed the bus in which you were riding, you observed the bus driver [209] swerved over into his left and over into the west lane at one time while you were approaching the bridge? And you answered: Yes, that was while the truck was in the bus's lane? A. Yes.

Q. Then you were asked this question: Did your bus get, actually get clear on the west side of the road for a part of that distance? And did you answer: I would say not entirely, no?

A. That is correct.

Q. The question: But it was partly over into the west or left hand lane? And your answer: Partly, yes.

A. Yes, that is correct. That is my impression.

Q. And then this question: And about what distance would you estimate that was from this bridge

(Testimony of Ronald E. Whiston.)

that this action took place? And your answer: Between 30 and 50 yards? A. Yes.

Q. Did you examine the tracks at any time after the accident? A. I did not.

Q. I believe you testified that you don't know whether or not the brakes were applied on the bus?

A. No, I didn't.

Q. Mr. Whiston, when you first observed this vehicle coming from the north could you tell what it was?

A. I could see it was a large tractor with semi-trailer behind it although I didn't observe exactly what trailer was. [210]

Q. You thought at the time it was a big tanker?

A. I did.

Q. And you described it as a large tanker in the statement after the accident, is that correct?

A. As far as I remember I did.

Q. And I believe you said you didn't pay any particular attention to the trailer?

A. I didn't see the trailer at all. I don't remember seeing what the trailer did. I knew it had a trailer on it.

Q. You didn't see what the trailer did at all?

A. No.

Q. The only thing you saw was the truck?

A. Yes.

Q. You didn't see what the trailer did as it approached the point of impact?

A. No, I didn't.

Q. Could you describe for us, Mr. Whiston, the

(Testimony of Ronald E. Whiston.)

course that the truck took when it went into the last, when it made these marks that you observed on this picture, Defendant's Exhibit 5?

A. Well after the truck came out of its second swerve it seemed to me to go back on its own side of the road, and then after the bus was practically on the bridge why it turned, the truck turned sideways and slid sideways down the road in front of the bus.

Q. It slid sideways? A. Yes.

Q. And were the wheels rolling? [211]

Q. You didn't pay any attention?

A. If I had paid attention to them, I may have seen them.

Mr. Jameson: That is all.

Redirect Examination

By Mr. Lush:

Q. Mr. Whiston, as the bus approached the scene of the accident were you conscious of the fact that it had gone over on to the shoulder of the road?

A. No, I wasn't.

Q. And was there any center line visible on the road? A. No.

Q. Is it possible that your impression that the bus had gone across the center line of the road was completely erroneous in view of the fact that the bus was so far over to the right?

A. It is very possible, yes.

Mr. Lush: That is all.

(Testimony of Ronald E. Whiston.)

Q. (By the Court): Did the witness give an estimate of the distance the oncoming vehicle was the first time he observed it? Did you?

A. I believe in that deposition I gave 150 yards.

Q. 150 yards? A. I believe. I am not sure.

Q. Was that before the first swerve you testified to? [212]

A. Practically the same or shortly before.

Q. You observed it about the time of the first swerve, is that right? A. Yes.

Recross-Examination

By Mr. Jameson:

Q. And at that time as I understand it, Mr. Whiston, the bus was about the same distance from the bridge as the truck was?

A. That was my impression.

Q. Whatever that distance may have been, 100 yards or 150 yards?

A. That is what I thought.

Q. The two were about equi-distant from the bridge?

A. I didn't see the bridge but that is my impression.

Q. And you so testified on your deposition?

A. Yes.

Mr. Jameson: That is all.

Mr. Lush: That is all.

MARTIN LAMB

was called as a witness for plaintiff, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lush:

Q. Will you state your full name, please? [213]

A. Martin Lamb.

Q. Where do you live, Mr. Lamb?

A. My address is Worland, Wyoming.

Q. And where do you live with reference to the town of Worland?

A. Now I live about 12 miles north.

Q. And where did you live with reference to the scene of the accident at the time of the accident?

A. In relationship you say with the scene of the accident?

Q. Yes.

A. Just immediately to the northeast.

Q. Is this place marked house at point "C" on the map a residence you lived in at that time?

A. Yes.

Q. And this driveway referred to as the Martin Lamb driveway, you are the Martin Lamb that lived at that place, is that correct?

A. Yes.

Q. Now on the date of the accident where were you at about the time the accident occurred, do you know?

A. Well I wouldn't have any time on it anyway.

Q. About 2:30 in the afternoon where were you?

A. Well I have an idea I was between Worland and home somewhere.

(Testimony of Martin Lamb.)

Q. You were on your way home? And do you know what time you arrived at the scene of the accident? A. No, I don't. [214]

Q. What is your best estimate of the time you arrived there?

A. Oh, I really have no—now I was in town at 2:00 when we started to get ready to come out and I stopped at a neighbor's house for a few minutes.

Q. And when you arrived at a point 9 miles north of Worland the accident had already happened?

A. That is right, it had happened anyway.

Q. You had seen evidence a few miles away that it had happened? A. That is right.

Q. What was the nature of that evidence?

A. Smoke.

Q. And how long had you lived in that place right near the scene of the accident?

A. From the spring of 1929 until the spring of 1940, then I moved back on the place the spring of 1945.

Q. And for about except for that five years you have lived there ever since 1929 up to the time of the accident? A. Yes.

Q. Are you familiar with the contours of the roads and ditches and land immediately adjoining the road at the scene of the accident?

A. Fairly well.

Q. And were you farming this section or this part of the land out here were you? A. Yes.

Q. What is the nature of the ditch or barrow pit

(Testimony of Martin Lamb.)

on the west side of the road and north of the scene of the accident? [215]

A. The ditch there is fairly wide and probably over 6 feet or better deep in relation to the roadbed; it wouldn't be that deep in relation to the original land. And there's quite a few trees in there, oh, 9 or 10, I have an idea.

Q. And what is the nature of the ditch on the west side of the road and south of the bridge?

A. Back at the beet dump approach and a little farther south than that it is probably the same depth, and from the approach north it would gradually get a little deeper. At the bridge it is probably 6 or 7 feet there in relation to the road.

Q. That is from this point north you say it gets deeper?

A. It gets a shade deeper as it goes along.

Q. And it is about the same depth as the ditch on the north side of the road?

A. Very near. In fact it is a little deeper than the ditch to the north at the bridge.

Q. Now what is the nature of the ditch located between the Martin Lamb driveway, to which we have so frequently referred, and the county road here?

A. That would not be over 2 or 3 feet probably, around somewheres between the two, and it is considerably narrower; I would say across the top it was probably 12 feet.

Q. What is the situation with reference to obstructions along the fence line between the county

(Testimony of Martin Lamb.)

road north of the [216] bridge and the Martin Lamb driveway at the time of the accident?

A. You mean visual obstructions?

Q. Physical obstructions?

A. Physical obstructions. Well it consists of solid posts setting at each end, in fact the posts consist of tops of the piling of that bridge, and in between there's steel posts, I believe every rod, and it's light gauge woven wire, it's fairly high, and single strand of barbed wire on top, probably 4 feet in height. of barbed wire on top, probably 4 feet in height.

Q. What is your estimate of the size of these steel posts that run there, are they tubular posts?

A. No, they are what they commonly call a "T" post.

Q. And what would you estimate would be the width of one of those posts?

A. Well they consist of what I would say probably was 3/16th strips, two of them fastened in the shape of a "T" with crimped edges.

Q. And what at the time of the accident do you know whether there were any obstructions along the fence line from the Sam Piel driveway to the same bridge?

A. Yes, Piel's always lined their farm machinery along there and within a road or two where the bridge is but in line with the bridge.

Q. And do you know whether or not that line of farm machinery was there at the time of the [217] accident?

A. The bulk of it was.

Q. And what was the nature of the farm machinery there, if you know?

(Testimony of Martin Lamb.)

A. Well it would be a general line. Now I don't recall just what all they would have had there. I don't believe any of their harrows was there, and the binder was there. It was lined solid. I think there was one tractor I know was there and there was another one that probably would have been there because they didn't run one of those in the winter, and otherwise it would be mostly plows, mowing machines, and so on.

Q. How long after the accident was it before you moved out to this place?

A. How long afterwards?

Q. Yes. A. I just moved this spring.

Q. From the time of the accident until this spring you have constantly lived in this place?

A. Yes.

Q. And for how many years immediately before the accident did you live there?

A. It would have been about eighteen months.

Q. Were you familiar with the nature of the roadway immediately north of the scene of the accident for five or six hundred feet and down to the bridge? A. Yes.

Q. And what is the nature of that roadway?

A. Oh, I would state it as good. It is as good a stretch as there was along that road and it had been protected a good [218] deal by the trees from freezing and thawing and the shoulders were in better shape and I don't recall any work being done on that road from that about until I moved.

(Testimony of Martin Lamb.)

Q. And is this one of the United States highways? A. Yes, U. S. 20.

Q. During the time you lived there what did you observe with reference to the amount of travel there was on it?

A. Well I would say travel was fairly heavy there generally.

Q. And is there a difference between the amount of travel in summer and winter?

A. Yes, it would vary a good deal on tourist travel and also on the amount of truck traffic there would be on account of——

Q. Would the travel on that be properly described as heavy in winter?

A. Well I think so. You would describe it as moderately heavy. It is, after all, the main highway through this Big Horn Basin.

Q. When you arrived at the scene of the accident did you observe the bus there? A. Yes.

Q. And where was this located on the road?

A. Well it was located when facing up east the rear end probably 6 feet from the western banister of the bridge. Now there is a culvert runs in through here and the door on the [219] bus was immediately over that culvert, and that culvert would run probably, oh, 8 or 10 feet from the banister from the eastern railing of the bridge. And it was, the front end would have been somewhat north of due east. Now, how much, I wouldn't know exactly, but it was enough so that I believe the rear end of the bus

(Testimony of Martin Lamb.)

would have extended maybe a few inches on to the bridge.

Q. And what was the general position of the tractor when you observed that?

A. Well it was a few points south of southwest. That was the tractor.

Q. It was pointing in what direction?

A. It was pointing in a southwesterly direction but the front end was a point or two south there.

Q. And where were the front wheels just with reference to the center line of the pavement?

A. I don't believe that the right hand front wheel would have reached to the center stripes of the highway.

Q. And was it the wheel that was farthest?

A. That would have been the closest wheel to the——

Q. And what was the general position of the trailer when you arrived there?

A. Well in order to—it would have been more north and south.

Q. It was at some angle to the tractor? [220]

A. It was not due north and south; it was at an angle to the tractor and was also headed a shade to the west.

Q. And where was the trailer with reference to the edge of the road?

A. The trailer was completely clear of the road.

Q. It was in the barrow pit?

A. Unless it would have been the front corner.

(Testimony of Martin Lamb.)

Q. And was it completely down in the barrow pit or was it on the shoulder or both?

A. Well I think you would find it was off the shoulder of the road. Now whether it would have reached to the bottom of the barrow pit or not, I don't recall; it was free of the road, however.

Q. Now did you observe the marks that were made by that tractor or trailer in the course of their movement across that road?

A. Well, yes, I followed two tracks.

Q. And calling your attention to Defendant's Exhibit No. 5, do those seem to be a fair representation of the tracks that you followed?

A. I would say they are a fair representation, yes.

Q. And do you know whether those tracks lead to the tractor or the trailer or both?

A. They are between them.

Q. Between them?

A. As I remember towards the rear end of the trailer but [221] they were between them.

Q. Now from looking at that exhibit can you tell, point out to the court how far north that exhibit shows on this Plaintiff's Exhibit No. 1?

A. It would show most of this approach right here.

Q. And that was the approach to the house across the road from yours? A. That is right.

Q. And it doesn't show all of that approach, however?

A. No, but from the angle the picture was taken

(Testimony of Martin Lamb.)

you would have to be standing approximately on the north side of it.

Mr. Lush: Did the court have a chance to look at that at all?

The Court: I looked at it before while you were examining the witnesses.

Q. Now will you describe the continuation of those tracks north from the place where they are shown in the exhibit?

A. They continued north over to about a point about a rod or possibly more, few feet more or less of this irrigation lateral.

Q. And on which side of the road did they appear to be, let us say the place where they appear on the Exhibit Defendant's Exhibit 5 and the place where you observed them to start?

A. They appeared on, I would say, the west side of the road. Now, of course, at that time you could not tell where [222] the center stripe on the road was.

Q. Generally on the westerly half of that road?

A. It was on that side of the road.

Q. Were they straight back in that area?

A. I don't know as you could classify them as straight; I would say they were in an orderly manner.

Q. They were what?

A. Orderly. Couldn't see any violent slippage sideways.

Q. Now how far north did you go in your attempt to follow those tracks?

(Testimony of Martin Lamb.)

A. Only to that point.

Q. Only to that point? A. Yes.

Q. And from that point could you see north of the road? A. Yes.

Q. And approximately how far north could you see?

A. It is possible to see half a mile of the road there.

Q. Did you observe the general snow covering of the road for half a mile north?

A. Well I wouldn't say that I could observe it and tell the snow covering a half mile of the road but I think you could see pretty well down there and it would consist of about a quarter of a mile from the bridge.

Q. Now from the point, farthest north point you walked on the road did you observe the road northward generally? A. Yes.

Q. Did you observe any difference between the appearance [223] of the snow covered on the road north of the irrigation lateral, shall we say, and south of the irrigation lateral? A. No.

Q. Did you have any occasion to go north that day other than straight up the road?

A. North? Well, yes, I did. I went out in the morning to the field.

Q. And where did you go in the field, can you point out on that map?

A. I run out of map too quick. It would be about $\frac{3}{8}$ ths of a mile east and then it would have been,

(Testimony of Martin Lamb.)

it would have lacked about 200 yards of being the complete half mile to the north.

Q. And where were you walking then, across the fields?

A. If I remember correctly, I drove out.

Q. You drove out? A. Yes.

Q. You drove across the fields?

A. I drove across. It consisted of coming into this lane somewhat east of here of the bridge and up and over it to the half mile point, and somewhat west.

Q. Do I get the idea the trail you followed was about a mile east of this?

A. Half a mile up this lane, then you would turn half a mile not quite north, and then I would go somewhat west; it was lacking 200 yards of being half a mile north.

Q. And did you observe any difference between the snow [224] covering at the scene of this accident, at the scene of the accident and the snow covering at the northern most point that you reached that day?

A. No. No, in fact, the conditions generally were the same. What I had gone to was a hay grinder.

Q. A what?

A. A hay grinder and found that there was the same ice covering.

Q. There was the same ice covering on that?

A. Yes.

Mr. Lush: You may cross-examine.

(Testimony of Martin Lamb.)

Cross-Examination

By Mr. Haughey :

Q. Mr. Lamb, did someone send you to check up on the track marks?

A. I wouldn't say send necessarily. Mr. Nicola did make the remark when I walked up to him, and if he had I wouldn't say that was previously to his checking them or afterwards. I rather think it was after he had checked them.

Q. Did you see him check the marks?

A. No. I might have seen him when I was checking them but I didn't watch him check them. And Mr. Nicola told me at that time, he said: "Go look at the tracks."

Q. Did he point out any particular tracks for you to look [225] at?

A. No. He might have thought there was just something that would interest me.

Q. Did you see more than one set of tracks leading north from the point of the accident?

A. At the point I investigated them there had been another one, another dual tired truck in. I only followed two tracks back there, and really didn't pay a lot of attention to the other set of tracks because they were so much clearer. They were the only two plain tracks that were cut down.

Q. Did you say you don't know whether there were any other tracks leading up to the tractor and trailer than the one set you did trace down?

A. That is the only set I traced.

(Testimony of Martin Lamb.)

Q. Is that the only one you saw?

A. Those are the only ones I noticed. However, there could very easily have been others and me not notice them.

Q. Now, Mr. Lamb, handing you what has been marked Defendant's Exhibit 7, I will ask you whether that fairly shows the scene of the accident from the south facing north? A. It does.

Q. And is there marked on there a line in pen and ink with some initials above it?

A. That is correct.

Q. Do you know what that line is intended to depict? A. Yes. [226]

Q. Can you tell us what it is, please?

A. That is a line that I drew, however, the initials do not connect with that line, but it is a line that I drew, I believe, at the deposition taken at Worland.

Q. And does that line fairly indicate the direction of the skid marks you traced?

A. Yes, with the thought in view you don't always get the same distance this way on a picture that you do this other way.

Q. In other words, that is shortened so this ink line is a little sharper than it actually was, or considerably sharper than it actually was on the road itself? A. Yes.

Q. And is the building in the right hand side of the picture, is that your house? A. Yes.

Q. I would like to find out about this telephone

(Testimony of Martin Lamb.)

pole. We made some stipulation about the plat. Is that pole standing in the corner of your land?

A. Yes.

Q. Was it standing there on the day of the accident?

A. Yes. Now this picture is not the same as the day of the accident. This pole was not set in the same place now; it is set over in here.

Q. In other words, it sets closer to the road now than in that picture? A. Yes.

Q. But this is a fair representation on the day of the [227] accident? A. Yes.

Mr. Haughey: We will offer in evidence Defendant's Exhibit No. 7.

Mr. Lush: No objection. Let me look at that. I jumped at a conclusion there. You are offering it for nothing but the purpose of the tracks and these initials are meaningless and so on?

Mr. Haughey: Yes.

Mr. Lush: No objection.

The Court: It may be received in evidence.

Whereupon said Defendant's Exhibit No. 7, being a photograph of the scene of the accident, offered and received in evidence, is a part of this record.

Q. (By Mr. Haughey): Mr. Lamb, did you draw the mark on that Defendant's Exhibit 7, the picture I just showed to you, before you had seen

(Testimony of Martin Lamb.)

the pictures which are now marked Defendant's Exhibit 5, which I now show you?

A. That is correct. Or to my knowledge it was before. I don't think I have seen that other one before.

Q. Now with reference to the direction of the track marks on the highway starting first at the northerly point where you could first find them present on the highway, would you say that was about a rod north of the irrigation ditch?

A. That is right. As I remember it there is an approach [228] into this field right along side of this where it shows the trees. Your trees would be in the approach and it was right at the northern edge of that some 16 or 18 feet from the lateral there.

Q. You said irrigation ditch or lateral?

A. That is correct.

Q. That is marked "B" on the plat?

A. Yes.

Q. And the tracks you first saw then the farthest to the north you could see them was a rod north of that? A. Yes.

Q. 16 or 18 feet north of the irrigation ditch marked "B" thereon? A. Yes.

Q. And in what direction did they go from that point? A. Southerly direction.

Q. Until they came to about where on this map?

A. To the northern trees in this group.

Q. Is that northern tree directly opposite from the Martin Lamb driveway?

A. Pretty well as I remember it.

(Testimony of Martin Lamb.)

Q. The direction of the tracks the first point to the north and that tree opposite this driveway was generally southerly, you say?

A. Yes, on the west side of the road.

Q. Was it about parallel with the west side of the road?

A. I would say fairly parallel. [229]

Q. And was it in a fairly straight line?

A. Yes. There could have been, oh, a widening of the track but I can't recall of them making any violent swerves anywhere.

Q. And then from the point opposite the tree which you pointed out opposite this driveway where did the tracks lead?

A. They lead in a southeasterly manner.

Q. And was the direction of the tracks in a southeasterly direction fairly straight?

A. Well, yes. Now it was hard to tell there for a short ways; you want to remember that they had used this driveway.

Q. You mean the driveway opposite your house leading westward?

A. Yes, leading westward they routed travel through there and there had been some traffic through there before I went.

Q. I wonder if for identification you would mark that driveway you are speaking of as "D", with the letter "D"? The traffic after the accident then was routed from the north westward through the lane marked "D" on the plat?

A. Yes, with the exception of a few cars that

(Testimony of Martin Lamb.)

come by and I believe a few of them entered this same lane here.

Q. In other words, some cars came closer to the bridge and went westerly along the road which is closer to the bridge?

A. I don't know if they had at that time or [230] not.

Q. Do you recall testifying on a deposition in other cases arising out of this accident in Worland? A. I do.

Q. And showing you a copy of the deposition I will ask you to read it and I will read it too so the reporter can get it. Were you asked the following questions and did you make the following answers:

Q. And you saw them—now this is referring, is it not, to the tracks we were just speaking about?

A. Yes.

Q. And you saw them following tracks the trailer would have taken beginning up here quite a ways north of the accident on the north side of the road?

A. That is correct.

Q. And you saw that they come straight south coming for a distance of how far would you say?

A. 85 paces.

Q. Is that from the north side of the driveway to this?

A. Yes, from 8 or 10 feet from the north side of the driveway.

Q. Then you say they took a definite turn to the driver's left? A. That is correct.

Q. Would you say they were straight across there then?

(Testimony of Martin Lamb.)

A. Generally a straight line. [231]

Q. Very near straight? A. Yes.

Q. Now did you so testify upon this deposition?

A. I think I did.

Q. Is that correct to your best recollection?

A. Yes. At that time I was under the impression that tree was somewhat north of the driveway.

Q. In other words, you now feel the angle started a little north of where you said it did in the deposition?

A. It could be a little south because at that time it shows this tree very nearly here in a straight line with that driveway, and I was under the impression it was 8 or 10 feet north and that is what I marked the turn at.

Q. You still feel it would be approximately opposite this driveway where the turn started?

A. Yes, right in that neighborhood.

Q. Now was there any particular evidence of any skidding, in the portion of the tracks we are talking about, was there any particular evidence of any skidding north of the place where the turn was made and where it started angling south and eastward?

A. That would be north of this drive?

Q. That is right.

A. I wouldn't even say that there was a pair of wheels making tracks; it could have been front wheels and hind wheels following each other across the road and it could have been [232] the other way.

(Testimony of Martin Lamb.)

Q. Do you recall having testified that there was no particular evidence of any skidding; that there was no skid action shown?

A. I said there was no evidence of them whipping, yes.

Q. I am speaking about skidding, Mr. Lamb.

A. Now what do you consider skidding?

Q. I am not testifying, Mr. Lamb. I am just asking you what you saw that day and how you testified in the deposition. You didn't go north of the irrigation ditch or rather the point on the road north of the irrigation ditch to observe or check the condition of the road on that day, did you? A. No.

Q. And do you recall having testified at Worland at the deposition that you did not have any occasion to examine how far north the road condition extended, is that correct? A. That is right.

Q. The place to which you drove later in the afternoon was a point approximately a half to three-quarters of a mile north and east of this?

A. It was in the morning.

Q. In the morning before the accident?

A. Yes.

Q. But it was in a direction north and east almost exactly, was it not, from the place of the collision?

A. Very nearly. Yes, very nearly north [233] east, east.

Q. Approximately half a mile east of the highway at that point? A. Yes.

Q. You didn't know whether those tire marks

(Testimony of Martin Lamb.)

that you saw were made by the truck, that is, the tractor or the trailer, did you, Mr. Lamb?

A. No.

Q. You couldn't tell because of the collision and the possibility of the vehicles having moved in different directions?

A. Without doubt they had moved somewhat.

Q. So is that why you couldn't tell?

A. Well not only that but you couldn't at the time I saw it then you couldn't follow them right up to the outfit. In fact the south track in particular, I think possibly the north track followed pretty well to the edge of the road but the other one it melted back.

The Court: We will take a recess. (3:40 p.m.)

(Court resumed at 3:50 o'clock p.m., at which time all counsel and plaintiff were present.)

MARTIN LAMB

resumed the stand and testified as follows:

Cross-Examination

(Continued)

By Mr. Haughey:

Q. Mr. Lamb, before the recess I think I asked whether or not you had testified in a deposition that a part of the [234] tracks to the north of the scene of the accident, that part of those tracks leading in a southerly direction showed no particular evidence of a skid mark and that as a matter of fact they showed a brake action but no skid action. Now I am

(Testimony of Martin Lamb.)

mistaken about your having testified that way in a deposition but let me ask you if you did testify to that effect at the cases tried here last week arising out of this same accident?

A. I believe that I did.

Q. And was your testimony in that respect correct?

A. I think so. I think that my statement on that was it showed no definite skid action.

Q. In your deposition did you distinguish between the type of mark left north of that angle and the part of the tracks leading southeasterly?

A. Not—I don't recall now.

Q. I am showing you again a copy of the deposition. You were asked: And that made a skid mark or track of 125 paces? Your answer: No, it made a skid track of 40 paces. Question: What was the other braking track? Your answer: You mean all together? Question: That is correct. Answer: Yes, 85 paces headed south and 45 paces headed at the angle across the highway; 125 paces is approximately what it would be.

Q. That was your testimony?

A. I think that is correct.

Q. Showing you, Mr. Lamb, what has been marked Defendant's [235] Exhibit No. 8, is that a fair picture of the scene of the accident from the north facing the town of Worland?

A. You mean with all conditions the same?

Q. No, I don't mean as to the surface of the highway but as to the locale?

(Testimony of Martin Lamb.)

A. The general locale, yes.

Q. And does it show fairly the Sam Piel house at the left side? A. Yes.

Q. And the yard to the front and west of the Sam Piel house?

A. The yard has been changed somewhat there.

Q. Since the picture was taken?

A. No, between the time of the accident and this.

Q. Between the time of the accident and the taking of this picture?

A. Yes. I would say that picture was possibly taken, my best estimate of that would be the latter part of January.

Q. In other words, something like a month after the accident? A. I think so.

Q. I didn't realize it was that long. Showing you what has been marked Defendant's Exhibit No. 9, is the same condition true? Does that show correctly the location of farm machinery you spoke about?

A. No, there was a good deal more machinery at that time over here. I think you will find that spring Piels were making [236] for a sale and they were dragging machinery around there steadily at that time.

Mr. Haughey: I offer this No. 9 as an exhibit.

Q. Does Defendant's proposed Exhibit No. 9 show correctly the angle in the highway to the south of the scene of the accident and the position of the bridge with respect to that highway?

A. I think so. Now what the highway angles at I really wouldn't say. There was an angle. It makes

(Testimony of Martin Lamb.)

a jog just the width of the oilmat or about the width of the highway. The highway follows the same course as quick as it makes that again as it was before.

Q. Does that jog in the road make it appear from the north that the bridge is somewhat narrower than the total width of the bridge, road?

A. Oh, it might. However, if you are looking down the oilmat, you could see it was wider than the oilmat is.

Q. If you could clearly see the edge of the oilmat under the conditions at the time?

A. Yes, I am sure that you could then.

Mr. Lush: I object to this testimony, your Honor, on the ground that the picture is the best evidence, the opinion of the witness with reference to optical illusion that might exist over and above that shown in the picture was not gone into on direct examination and is not proper [237] cross-examination, and if he would like to call the gentleman as his witness, he could proceed.

The Court: Yes, I think perhaps the objection is good.

Mr. Haughey: We offer in evidence Defendant's Exhibit No. 8.

Mr. Lush: Could we have some information on when this picture was taken?

Mr. Goppert: January 17, 1947. That is in one of these other depositions.

Mr. Lush: Then no objection, your Honor.

The Court: It may be received in evidence.

(Testimony of Martin Lamb.)

(Whereupon said Defendant's Exhibit No. 8, being a photograph, offered and received in evidence, is a part of this record.)

Q. (By Mr. Haughey): When did you make the examination of the tracks, Mr. Lamb?

A. I wouldn't have any idea really what time it was but it was sometime after I was there. After I first arrived on the scene it was quite a little while after that.

Q. Had the bodies been removed from the bus at that time? A. No.

Q. Was Mr. Ward, the Highway Patrolman, there at that time?

A. I rather believe that he was but I wouldn't definitely [238] state whether he was or not.

Q. Have you any estimate about how long after it was you arrived?

A. I would have no way of estimating that. It would have been, I think, sometime after an hour had elapsed.

Q. You drove to the scene of the accident from the south, did you not? A. Yes.

Q. And can you tell us the speed at which you traveled?

A. Not exactly. My speedometer was broken at that time.

Q. Can you estimate the speed?

A. Oh, I don't think I traveled over 20 or 25 miles an hour.

Q. Did you skid on the way down to the scene of the accident?

(Testimony of Martin Lamb.)

A. Not that I recall. I did slip the wheels slightly when I first saw it and got in a hurry.

Q. Didn't you testify in the other trial you slowed down when you began to slip on the highway?

A. Yes, when I began to slip. I did hit the gas and I realized then really how slick it was.

Q. Was it very slippery to the south of the spot of the accident?

A. It was very slippery, however, I was driving an old model car which really was not in too good shape for steering. I wouldn't base what I could drive it against anything else [239] in the world.

Q. Did the condition of the highway at the scene of the collision interfere with your checking the tracks left by the two vehicles?

A. How was that again, please?

Q. Did the condition of the roadway interfere with your checking of the tracks left by the vehicles?

A. It was slick around there. If I remember right, you would slip around and I didn't do any measuring or pacing that day.

Q. Was the reason you didn't make any measurements it was slick? A. That is right.

Q. Was your answer, that is right?

A. Yes.

Q. Now showing you Defendant's Exhibit No. 5, I will ask you if you will mark the two tracks which you paced and checked, that is, which you checked on the day of the accident and stepped off or paced sometime later?

(Testimony of Martin Lamb.)

A. What kind of marks do you want?

Q. Mark 1 and 2. 1 on one track and 2 on the other. Will you put circles around those so they will be distinguishable. Now do those tracks which you have now marked 1 and 2, and which proceed in the direction of the vehicles, are those the tracks which you marked and checked that day?

A. Yes, those are the ones.

Q. Were those the only ones north of the scene of the [240] accident that you could at all connect with the truck and trailer?

A. At the time I did that I was not trying to connect or reconstruct.

Q. Did you see any other tracks which you thought lead to the truck and trailer?

A. No, I didn't.

Mr. Haughey: That is all.

Mr. Lush: You may step down.

WILLIAM H. DEES

was called as a witness for plaintiff, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lush:

Q. Will you state your full name, please?

A. William H. Dees.

Q. Where do you live, Mr. Dees?

A. Worland, Wyoming.

Q. What is your occupation?

A. At present?

(Testimony of William Dees.)

Q. Yes. A. Truck salesman.

Q. And calling your attention to the date of the accident, December 27th, 1946, about 2:30 p.m. were you riding on a bus that was involved in an accident about 9 miles north of Worland?

A. I was. [241]

Q. And where were you seated on that bus?

A. I believe it was the second seat from the front on the right hand side of the bus.

Q. Were you seated over next to the window?

A. Next to the aisle.

Q. And as you approached the scene of the accident did you observe another vehicle coming from the opposite direction? A. I did.

Q. And about where was that vehicle if you can locate it on the map at the time when you first observed it?

A. It was about at the culvert.

Q. About at the culvert you say? This irrigation lateral, is that what you are referring to?

A. Yes.

Q. And did you observe where the bus was at that time?

A. It was just south of the Piel mail box, I believe.

Q. Pardon?

A. Just south of the Piel mail box.

Q. And where was the Piel Brothers mail box with reference to the driveway into Sam Piel's home, north or south?

(Testimony of William Dees.)

A. I believe it was on the north side of the driveway.

Q. And did you observe that mail box at about the same time you observed the vehicle approaching from the opposite direction?

A. I just noticed the mail box and I looked up and saw the truck.

Q. And what motion did you observe the truck to make as [242] it came south from the point where you first observed it?

A. I didn't get that question.

Q. What was the motion of the truck, if any? What was the attitude of it on the road when you first observed it; was it running in a straight line or swerving?

A. It was straight when I first saw it.

Q. And did you observe it swerve after that?

A. Immediately after it did.

Q. And to which side did it swerve?

A. To the east slightly.

Q. And did it straighten out after that swerve?

A. Some.

Q. And did you observe it swerving again?

A. It did.

Q. And did it straighten out after that swerve?

A. Very little.

Q. And calling your attention to Defendant's Exhibit No. 5, would the track marks shown on Defendant's Exhibit No. 5 then fairly represent the course that was followed by the trailer or the truck in coming across the road from the drive opposite

(Testimony of William Dees.)

the Martin Lamb house? This is the Martin Lamb; the drive opposite the Martin Lamb house, is that a fair representation of the course followed by either the tractor or the trailer afterwards?

A. It was in the last dive. [243]

Q. In the last dive; in other words, the truck swerved the third time, did it? A. It did.

Q. And this represents roughly the course that followed, is that correct, as you remember it, or doesn't it, if it doesn't? A. Yes, it does.

Q. And in what position was the tractor part of that truck as it came down the highway toward you?

A. Well there was a lot of different—which one do you mean?

Q. Starting with this last swerve, what was the general——

A. This last dive it went to the east. He was on his side of the road and then he came back to the east and started back to the west, and then he slid down the road sideways for some distance, I wouldn't say just how far just before they hit.

Q. And were you observing that truck all the time as it was approaching you? A. I was.

Q. Did you observe the truck when it first started turning sideways toward you on the last swerve?

A. On the last one?

Q. Yes. A. I did.

Q. This third one, I guess you did describe it. What can you tell us with reference to the position of the wheels or the movement of the wheels of the

(Testimony of William Dees.)

truck as it first started to turn sideways on that last swerve?

A. They were definitely locked on the [244] tractor.

Q. On the tractor. And did you keep watching the wheels?

A. I was watching the tractor in general. I do know that the wheels were definitely locked in the last dive.

Q. And do you know whether or not they remained locked as the truck came down the road towards you? A. Sideways?

Q. Yes.

A. They were. They wasn't moving. I guess they were locked.

Q. Do you remember the movements of the bus from the time that you first observed the truck?

A. I do.

Q. Coming towards you. And what were the bus movements, as you recall?

A. It was gradually slowing down.

Q. And did you observe whether or not the bus driver was applying the brakes?

A. I couldn't tell you.

Q. And do you have any idea of the speed at which the bus was going when it approached Sam Piel's driveway?

A. Probably 20. When it approached the Sam Piel driveway?

Q. Yes, coming to Sam Piel's driveway?

A. Oh, probably 30, 35.

(Testimony of William Dees.)

Q. And do you have an opinion as to the speed of the bus at the moment of impact?

A. Probably 20, 25. [245]

Q. Did the bus to your knowledge turn from a straight line from the time it left Sam Piel's driveway until the moment of impact?

A. It went straight up until just before it hit.

Q. What was the movement just before it hit?

A. It seemed to me that there was movement to the east slightly.

Q. You mean to the right?

A. The bus driver's right, yes.

Q. And where did the impact take place with reference to the bridge, if you know?

A. Well I would guess probably 10 feet north of the bridge.

Q. And what was the position of the bus with reference to whether it was pointed north or south or east or west at the moment of the impact?

A. Well I didn't see it hit.

Q. You felt it, however?

A. I felt but I didn't see it. I saw it just before it hit.

Q. And just before it hit what was the position of the bus?

A. Well I would say the bus was north and slightly east.

Q. Did it appear to you that the bus driver was attempting to turn the bus just before the impact?

A. I believe he was. [246]

(Testimony of William Dees.)

Q. And what was the position of the bus after the impact, do you know?

A. I couldn't tell you.

Q. Do you know where the bus came to rest or didn't you observe that?

A. No, I wouldn't say.

Q. Now at any time while you were riding on that bus—where did you get on it?

A. The front door.

Q. And what town?

A. Where did I get on?

Q. Yes. A. Oh, in Worland.

Q. At any time after the bus left Worland did you feel it skid?

A. No, I don't believe I did.

Q. And did the driver seem to have any trouble keeping the bus under control?

A. No, not at all.

Q. What was your occupation at the time of the accident? A. I was in the trucking business.

Q. And were you in business for yourself or were you working for somebody?

A. For myself.

Q. Have you had experience in driving trucks and trailers, truck-trailer combination?

A. I have.

Q. The truck involved in this accident is described as a tandem rear drive International West Coast Special, have you ever driven that particular type of truck? A. That particular kind?

Q. Yes. A. Not a West Coast, no.

(Testimony of William Dees.)

Q. Have you driven similar trucks? [247]

A. W.D. 28 White. That is, I believe, classed as a size smaller.

Q. And the trailer involved in this accident, I believe the picture shows I believe is a tandem, has tandem wheels on the rear and has no wheels on the front, rests on the tractor and is known as a semi-trailer, I believe? A. Yes.

Q. Have you had occasion to pull such vehicles?

A. I have.

Q. How many years experience have you had driving tractors with semi-trailer?

A. Four or five years.

Q. Have you had experience driving such vehicles on icy roads? A. I have.

Q. And where, in what general area have you driven those vehicles? Have you driven through Wyoming with them? A. You mean on icy roads?

Q. Yes. A. All over the State of Wyoming.

Q. Have you driven them both north and south on Highway 20? A. I have.

Q. Have you ever previously made estimates of the distances that the vehicles were apart at the time when you first observed them?

A. I estimated 300 feet.

Q. If the distance from the middle of the drainage ditch [248] to the point of that lateral, that irrigation lateral is 425 feet, and if the distance from the middle of the drainage ditch to the Sam Piel driveway is 165 feet; in other words, assuming that map to be correct would you care to correct your

(Testimony of William Dees.)

previous estimates as to how far the vehicles were apart when you first observed them?

A. That would be 700—you mean from where they were apart from this drainage?

Q. You estimated did you say previously the vehicles were 300 feet apart? A. Apart.

Q. Now if it is 425 feet from the irrigation lateral to the middle of the drainage ditch, and it is 165 feet from the middle of the drainage ditch to the Sam Piel driveway, middle of the Sam Piel driveway? A. It would be around 700 feet.

Q. Then would you care to revise your estimate as to how far apart those vehicles were when you first observed the truck?

A. Well I was wrong about it according to this map. The map says around 700 feet, a little over. I was evidently 400 feet short.

Q. And your best recollection at the present time is that those, information is that those vehicles must have been 700 feet apart when you first observed the truck? A. According to the map. [249]

Mr. Lush: That is all.

Cross-Examination

By Mr. Goppert:

Q. Mr. Dees, as I understand you now you were riding in this bus and sitting in the seat right behind where Mr. Whiston was sitting?

A. That is right.

Q. That would be the third seat from the front on the righthand side next to the aisle?

(Testimony of William Dees.)

A. Yes, that is right.

Q. And your view of the Sam Piel mail box was out through the front window, was it not?

A. That is right.

Q. And you observed, did you not, a lady sitting in the front seat, or was she laying down?

A. Laying down.

Q. On the righthand side?

A. She took up the whole seat.

Q. That is the seat in front of the door?

A. That is the seat right beside the driver's seat.

Q. Now then the door takes up one space so there is a missing seat there?

A. Yes, that is right.

Q. So you are in the fourth space back on the east side of the bus?

A. Assuming there was a seat where the door was.

Q. If you figure it from the other side, it would be the fourth seat back on the lefthand side, wouldn't it? It [250] would be the same place as the fourth seat back on the lefthand side?

A. I couldn't examine it that close.

Q. Anyway you were very close to the middle of the bus from front to rear?

A. I believe I was closer to the front than I was the rear.

Q. Probably one or two seats, weren't you?

A. At least two.

Q. Anyway it was from that position that you got your view of this accident?

(Testimony of William Dees.)

A. That is right.

Q. And as I understand you you observed a truck coming down the road toward you, toward the vehicle in which you were riding?

A. That is right.

Q. Of course, you couldn't tell that was a West Coast Special when you first saw it?

A. Maybe not when I first saw it but shortly after I saw it I knew it was a West Coast.

Q. You discovered it was a West Coast Special shortly after you saw it? A. Yes.

Q. Was it when it made the first little jog there or the second?

A. I don't remember which jog but shortly after I decided what kind of a truck it was.

Q. Well it was not the fact that it made a job that made [251] you think it was a West Coast Special, was it? A. I don't know about that.

Q. Well you tell me if you can place the time that you identified that truck with reference to its course toward you?

A. Oh, just guessing I would say probably in the second dive.

Q. In the second dive. That is before the third swing across the road you knew it was a West Coast Special?

A. He swerved a little the first time.

Q. Now you saw it had a trailer on it, didn't you? A. No, I didn't.

Q. You didn't see a trailer on it?

A. No, I didn't.

(Testimony of William Dees.)

Q. You saw and knew an insignia on it, didn't you? A. I did.

Q. Well where was it with reference to its course down to you when you saw that insignia on it?

A. The first time? I saw it two or three times.

Q. Now two or three times. I only thought you saw it twice. Now it is three times. Tell me the first time?

A. I believe when he was going back to the west on the second dive or when he was completing the second dive I believe is the first time I saw the name.

Q. Now you say these were dives?

A. Didoes, whatever you want to call them. [252]

Q. Didoes you call them. As a matter of fact what you are trying to tell me is that you saw that truck, the truck part without the trailer swaying back and forth across the road?

A. That is right.

Q. It didn't come in a straight course down its own side of the road from that culvert?

A. Well when it come out of it, every time it would complete its dido, it would straighten up a second before it would start in the other one.

Q. Let's get the width of these didos. Was it sliding from one side of the road to the other?

A. You mean from the first time I saw it?

Q. That is right? A. No.

Q. It didn't, the whole truck didn't slide back and forth from east to west and west to east?

(Testimony of William Dees.)

A. Sure it did. Not at the first it didn't.

Q. Now I want you to tell me about that first dido, dive, or whatever you want to call it?

A. He just swerved first.

Q. The front end swung to the east and then swung back to the west?

A. Some to the east; it wasn't a big one.

Q. Would you say it swerved two feet to the east?

A. I don't know. I couldn't estimate that far away.

Q. Well did it swerve half the width of it? [253]

Q. Or did it seem like it was going over a rough road and swinging back and forth?

A. I just said it swerved. I don't know how far.

Q. As a matter of fact you aren't able to describe that swerve any more than you have right now?

A. Not the first one, no.

Q. Was it a foot or two off a straight line?

A. Oh, I would guess two or three feet probably.

Q. Now then I want to get this thing straight and that is about this approximate distance apart when you first observed that truck and the bus in which you were riding. You knew where it was with reference to this bridge? The first thing that entered your mind was that they were going to pass on this bridge, isn't that a fact?

A. No, I don't believe I just really thought they were going to pass on the bridge. I might have thought they would probably meet at the bridge.

(Testimony of William Dees.)

Really I don't remember. It would have been right close to the bridge all right.

Q. You said it looked like they would pass close to the bridge? A. Yes.

Q. Now isn't it a fact you actually believed when you first saw it that they were going to meet and pass on the bridge unless somebody did something about it? A. I don't remember that.

Q. You remember testifying in December of 1947 about [254] that, don't you? Directing your attention to page 8 of your deposition given at Worland, Wyoming, in December, 1947, I will read the questions and answers and you check it and see if that isn't a correct statement of your testimony at that time:

Q. It was on its own side of the road headed in your direction? A. Yes, that is right.

Q. Headed as though it was going to pass you?

A. That is right.

Q. Didn't it look like the two of them might pass on this bridge?

A. If he had kept coming, yes.

Q. Did you so testify at that time?

A. I did.

Q. If he hadn't slowed down, you would have passed on the bridge? A. That is right.

Q. Did you so testify at that time?

A. I think you are asking me one question before and then you asked me another one here.

Q. The question is: If he hadn't slowed down, you would have passed on the bridge? Answer: That is right.

(Testimony of William Dees.)

A. I might have said that. He wasn't talking about that, about the swerve he was making between the time—I didn't [255] know how many swerves he was going to make.

Q. That would have slowed him down?

A. Yes.

Q. If he had been going at the same speed?

A. In a straight line.

Q. You would have passed on the bridge?

A. Possibly.

Q. And you still believe from your recollection of it that that is what would have happened if it hadn't swerved or hadn't slowed down, or if your bus had not slowed down, they would have passed on the bridge?

A. Possibly.

Q. So in order to come to that conclusion on your part you observed this vehicle was going about 35 miles an hour, didn't you?

A. At the time I first saw it?

Q. When you first saw the other vehicle?

A. About that.

Q. And you could see from your judgment the vehicle was coming toward you at approximately 35 miles an hour, wasn't it?

A. I don't know. It could have been 35 or 45 or 50 as far as I am concerned. I couldn't tell.

Q. You don't know anything about that?

A. I couldn't tell how fast a man was going as the map shows 700 feet away. [256]

Q. Now, you observed just before the collision

(Testimony of William Dees.)

this truck and it didn't, so far as you could see didn't have any trailer on it and you could observe the position the truck was in, couldn't you?

A. That is right.

Q. I believe you said that this Exhibit 5 showed the approximate final course, is that right?

A. In the first part of the third dive.

Q. The first part of a third dive?

A. He was like this.

Q. It shows a mark here that goes clear across the road a parallel set of marks, is that the approximate course that the truck took across the road that you saw?

A. Then he got here where you see the tracks looks like went into the barrow pit; he come back again and right there is where they hit. In what direction was that taken?

Q. From the north looking south. See, your bus is down there.

A. I see. Yes, that is right.

Q. Let's get this straight. As that truck came across that road it circled. Could you locate on there any natural object about where it started from the west side to the east side; would you name some natural object there if you recall?

A. You mean when I first saw it?

Q. Now, when it came across the road when it made the first dive or dido.

A. I wasn't paying any attention to objects right then. [257]

Q. It traveled what part of the distance from

(Testimony of William Dees.)

where you first saw it to where it finally stopped, if you could give that approximately?

A. I don't know.

Q. Well, let's take it on one more basis. It started approximately from the east side of the road on this third dive or dido, didn't it?

A. Yes.

Q. And other people located that at approximately the west end of the Lamb driveway near that clump of trees there and they saw it coming across the road a distance of approximately 125 feet crosswise across the road, is that your recollection of it that it swung across the road a distance of about 120 feet?

A. I imagine he went around 100 feet, just estimating.

Q. Was it while it made that dive or trip across the road that you saw the Manning Company sign?

A. I did.

Q. On which side would it be, on the left door or the right door?

A. On the right door.

Q. You saw it on the right door, then the truck was headed southeasterly then, wasn't it? The front end was going across the road toward the southeast?

A. Yes, that is right.

Q. And just before they collided did I understand you to say that the front end then headed southwest?

A. West.

Q. Or west, and you saw the sign again then, did you?

A. I did. [258]

Q. And then you saw it on the other door, the

(Testimony of William Dees.)

one on the lefthand side just before the collision?

A. That is right.

Q. And you saw that close enough, did you not, so that you could observe the speed of it as it was coming across the road?

A. Oh, I could guess.

Q. How? A. I would just guess.

Q. And you said the bus was going about 20 when they collided; was the truck coming about 20, too?

A. Both of them I figure were going between 20 and 25 at the time they hit.

Q. Both of them were going about the same speed when they hit? A. That is right.

Q. But the bus was going toward the southwest, is that right? I mean not the bus, the truck?

A. It was headed to the west the last time I looked at it.

Q. And you could tell from where you sat in that fourth seat back from the front that the front, the left front corner of the bus was going to collide with the truck at approximately?

A. Six inches to 1 foot behind the cab.

Q. What?

A. Six inches to 1 foot behind the cab.

Q. Now, that was your testimony previously, wasn't it? [259] A. Yes.

Q. And you could actually do that in spite of the fact both of your vehicles were moving? You saw the bus say coming east and the truck going to

(Testimony of William Dees.)

the west, or southwest, whichever it was, you could tell they were going to collide at that point?

A. That is right.

Q. And you never saw the actual collision?

A. No.

Q. About how far apart were those two points you saw were going to collide when you last did observe? A. They wasn't very far.

Q. Two feet, 10 feet?

A. I don't think it could have been over 5 feet.

Q. How old are you? A. Twenty-five.

Q. You were 23 then? A. Yes.

Q. Where was it that the tractor, this Manning truck, slide down the road sideways; where was it doing that?

A. Just before it hit, just before the impact.

Q. Now, I want to get that straight. The front end was headed west or southwesterly and it was coming sideways, was it? A. Sideways.

Q. How long had it been in that position?

A. Oh, I would say very—I don't know, those feet went by pretty fast.

Q. Beg your pardon?

A. It was going by pretty fast or coming pretty fast; [260] possibly 75 or 100 feet.

Q. Had it slid in that position from the center of the highway across the road? A. No.

Q. And it took that position when it got on the east side of the road?

A. When it got on the east side of the road and then turned back to the west. It was on our side of the road sliding sideways until it hit.

(Testimony of William Dees.)

Q. Would you say it slid sideways the last 10 feet before the collision?

A. No, I wouldn't say 10 feet before the collision.

Q. Fifty feet? A. Possibly 75 or 100 feet.

Q. All right, it slid sideways into this bus sideways a distance of 75 feet? A. Roughly.

Q. I want to get that position to make it clear. I am not trying to confuse you. I am trying to get the exact fact. Because you gave me so much detail I want to get it right. We come back then to this course of this track that shows in Defendant's Exhibit No. 5, a distance of 75 feet toward the north, and that is where the truck, as I understand you had the front end of it headed westerly and the rear end was easterly, and it was sliding sideways, and it took that course then in a sort of southeasterly direction, is that right?

A. Give me that question again.

Q. I believe I had better put a preliminary to that this [261] way. Was the front of the truck with reference to the rear, was it headed east and west or was it from the southwest to the northeast?

A. Just before they hit you mean?

Q. Well, that last slide, that last 75 foot slide?

A. Yes, it was headed east and west.

Q. You mean due east and west?

A. Well, roughly guessing.

Q. Approximately east and west? A. Yes.

Q. Across the roadway and it was sliding down that roadway in a general—well, was it skidding

(Testimony of William Dees.)

toward the center of the road, toward the easterly side of the road?

A. From the center it would be the east in that last 75 feet that I estimated?

Q. Yes.

A. No, he was sliding mostly south I would say.

Q. It was almost coming straight south?

A. That is right. It could have been a little slightly twisted one way or the other.

Q. It wasn't rolling on its wheels either easterly or westerly; it was going sideways?

A. It was definitely sliding.

Q. So what you said a while ago about the wheels being locked was that you guessed they were locked because they weren't turning? [262]

A. That is one reason and also the way the truck was acting I knew his wheels was locked.

Q. Because it was skidding?

A. That is right.

Q. Did you ever see a truck skid without its wheels being locked?

A. Not like that one did.

Q. Now, you tell us how it would differ from one that didn't have its wheels locked, if you could?

A. Say this was, say you had a rough spot in the road with a truck and you didn't get on your brake and yet your truck slid, which sometimes they do, not very often.

Q. They do do that if they are on ice?

A. On ice it might slide a little, or it might just

(Testimony of William Dees.)

wiggle a little, a foot or may even go 2 or 3 feet just the second it hits, but as long as you don't get on your brake it will straighten up.

Q. Now, then, you didn't check the tracks at the scene of the accident?

A. As far as I am concerned I don't know anything about it.

Q. And you do know the West Coast Special has brakes on all wheels front and rear on the tractor?

A. That is right.

Q. And you would normally expect then to see had you investigated the scene of the accident four separate tracks, wouldn't you?

A. Not necessarily.

Q. Well, you wouldn't expect to see just two that were [263] approximately the width of the regular wheel tracks?

A. You wouldn't necessarily see four, either.

Q. Well, you would either see four or some of them would have to follow the others, wouldn't they, if the wheels were locked, isn't that right?

A. If it was sliding sideways or when it was making these dives if it should slide sideways, then you would make out a track every now and then.

Q. The tracks would be irregular then, wouldn't they, and they would cross over and they wouldn't be equidistant, would they, isn't that all right?

A. Not all of them wouldn't be equal but two of them would be either if he was sliding sideways or even if he was sliding straight.

Q. Which two would those be that would be

(Testimony of William Dees.)

equal? A. It could be the front or the rear.

Q. But if there were only two tracks then the only way it could be sliding would be front to rear or rear to front?

A. The two tracks would have to be just sliding straight down the highway.

Q. Now, what you saw was a truck coming sideways, that is, almost due east and west across the highway, and headed almost straight south; that is what you saw that last 75 feet, isn't it? [264]

A. No.

Q. What was it you saw?

A. What was that question?

Q. As I understood your evidence you picture this thing for the last 75 feet of the slide of the truck before you had the collision with it, that the east—no, I mean the front end of it was headed west and the rear end was headed east, and it was sliding southerly toward your bus on your side of the road? A. Yes, that is right.

Q. Now, just before it got into that position had it then headed with the rear wheels following the front wheels or did it just gradually go into that position?

A. When it came out—when it started in its third dive it straightened up just for a second and then it turned to the east.

Q. The front end?

A. The front end turned to the east and then it twisted back to the west, and when it twisted back

(Testimony of William Dees.)

to the west he never did get it back to his side of the road; he slid sideways.

Q. Then the course between you and me is the highway we can take the truck on the west side; it starts heading southeast? A. That is right.

Q. And comes about half way across the road, is that [265] right?

A. No, he came definitely on our side of the road and over on the shoulder a little bit.

Q. Clear across on the shoulder a little and then the front end headed west?

A. That is right.

Q. And the front end got almost from east and west and then it slid down the road on the east side?

A. That is right.

Q. In a southerly direction?

A. That is right.

Q. Until the point of the impact was finally reached, which you place approximately 10 feet north of that bridge? A. That is right.

Q. And that slide was being made at approximately 20 miles an hour when you last saw it just before the impact? A. That is right.

Q. Did you say that last final slide was approximately 75 to 100 feet? A. Yes, sir.

Mr. Goppert: That is all.

Redirect Examination

By Mr. Lush:

Q. Now, Mr. Goppert asked you on cross-examination, I believe, whether or not you had expressed

(Testimony of William Dees.)

the opinion sometime in the past that these two vehicles would meet on the bridge [266] if they both maintained their speed, is that right?

A. That is right.

Q. From your experience as a truck driver and from your knowledge of Highway 20 in driving over it and from your knowledge of the size of the regular road buses, do you know whether or not those two vehicles could pass over the bridge at the same time?

A. Definitely, they could.

Q. Have you had occasion as a truck driver to meet with buses on bridges like that?

A. I have.

Q. And have you met with buses such as that on icy highways on bridges?

A. I have met them on bridges where I didn't know whether they were going to beat me to the bridge or I would beat him, but we didn't meet on the bridge, but I guess I was just lucky and beat him to it.

Q. On a bridge that size would be no particular danger in passing a bus on the bridge, would there?

A. Not one of that kind.

Q. Now, Mr. Goppert asked you about how you knew that the wheels were locked on that truck and you said something to the effect that you could tell by the movement of the truck. Can you explain that more clearly for the Court?

A. Well, any time you are going down the highway and you, and the highway is icy and you jump on your brakes on a tractor if he was pulling a

(Testimony of William Dees.)

trailer which they say he was, but I didn't [267] see it, and you get on your tractor brakes your trailer will push you and whenever your trailer pushes you you will start jackknifing. As long as you stay on your tractor brakes she is not going to straighten up. I don't see yet how he ever kept it on the road, but that is just a miracle happening or something because they don't usually do things like that.

Mr. Lush: That is all.

Recross-Examination

By Mr. Goppert:

Q. Did I understand you to say that you consider the proper way of driving a truck to pass another vehicle on a bridge?

A. If you knew the bridge.

Q. Or would you try to beat him to it?

A. If this was on ice and the ditch is too deep to take, there is only one thing to do, either beat him to it or him beat you to it.

Q. If you are on ice, you want to run a race with him to see who gets there first?

A. If the ditch you figure is more dangerous and isn't enough room on the bridge to meet the bus, then I would say try it. I would.

Q. In other words, try to beat him to the bridge?

A. That is right. [268]

Q. Do you believe that would be safe practice for driving of a truck? A. I know it is.

(Testimony of William Dees.)

Q. On ice?

A. You can't stop, then I don't care who he is.

Q. Suppose you hit a bump and had skidded?

A. As long as he keeps his foot on the carburetor she won't do it not on a straight stretch.

Q. You believe that it is good practice as a trucker that he should beat them to the bridge?

A. If you can avoid meeting them on the bridge, avoid it, but whenever you get in a predicament like he was in and on the bridge you might as well go ahead straight because he is either going to ditch it or get over or meet on the bridge, which that is the worst thing to do.

Q. To meet on the bridge?

A. To get on the brakes.

Q. To get on the brakes?

A. That is right, especially the tractor brakes.

Q. How about putting the trailer brakes on?

A. That is the proper brake to use.

Q. And if he used trailer brake, he used the proper brake? A. That is right.

Q. And that if that didn't slacken his speed, shouldn't he put on a combination of the both, maybe, then?

A. On a big outfit like that if the trailer is a proper [269] trailer for that truck, whenever he gets on his pedal he is on his tractor and trailer brakes at the same time.

Q. Do they have a separate system for the trailer? A. They have.

Q. It is on the steering wheel, isn't it?

(Testimony of William Dees.)

A. That is right.

Q. Isn't it common practice for truck drivers to first apply the air to the trailer?

A. That is right, on ice.

Q. Yes, that is what I mean. I am talking about on icy roads. And isn't the next step, if that don't slacken your speed, you also do what they call fanning the brake? I mean your foot brake and get your foot off the gas?

A. Just as long as you don't let your wheels slide.

Q. You do it by a sort of trial and error, you put your foot on to see how much it will take and then you would take it off; that is what you call fanning the brake, isn't it? A. Yes.

Q. And in that position you have got your foot off the throttle and you are tapping your brakes to see how much they would stand before there is any evidence of skidding so far as you are concerned?

A. That is true.

Q. And if you feel any evidence of skidding, you immediately get your foot off that brake and slip it on the throttle? A. That is right. [270]

Q. That is the way an experienced trucker does?

A. That is the way I do.

Q. Isn't that the common practice among truckers? A. Yes, it is.

Q. From what you observed of that truck weaving in and out those two times he was doing that, wasn't he?

(Testimony of William Dees.)

A. No, he definitely was on his brake, on his tractor brake.

Q. It is attached up so that the trailer is on the tractor?

A. It wasn't working. There was something wrong with it. Any time you get on your trailer brakes on an icy road where the road slope like that road is your trailer will go in the ditch.

Q. You never saw a trailer on this one?

A. No, but your argument is a trailer is on it and I am just agreeing with you on that.

Q. Which ditch would the trailer go in?

A. If he was in the middle of the road and your trailer was one farther on one side than the other, it would go into the ditch the slope of the road.

Q. In other words, it would have gone into the ditch on the west side of the road?

A. The west, yes.

Q. That is where it would have gone if he had had the [271] tractor brake fixed?

A. No, if he had the trailer brake fixed.

The Court: I think you are through with this witness. There is a good deal of repetition here. Call your next witness.

GEORGE F. HONEYCUTT

was called as a witness for plaintiff, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lush:

Q. Will you state your full name, please?

A. George F. Honeycutt.

Q. Where do you live, Mr. Honeycutt?

A. Previous or lately?

Q. At the time of this accident where did you live?

A. I lived at Worland, Wyoming.

Q. Where you you live now?

A. Powell, Wyoming.

Q. And in calling your attention to the date December 27, 1946, at about 2:00 p.m., where were you about that time, do you know?

A. I believe I was en route to Worland.

Q. And where were you coming from?

A. From Pure Oil No. 2 north on Highway 20.

Q. And as you came south on Highway 20 where did you come on to Highway 20?

A. At Reardon. [272]

Q. At Reardon. And how far north of the scene of the accident is Reardon, do you know?

A. Possibly three miles.

Q. And as you—were you driving?

A. Yes, sir.

Q. And what were you driving?

A. A ton and a half Chevrolet winch truck, C.O.E. cab over engine.

(Testimony of George F. Honeycutt.)

Q. And as you approached the scene of the accident or as you came south from Reardon did you observe the nature of the road surface from Reardon to the scene of the accident? A. Yes, sir.

Q. And what was the nature of the road surface from Reardon to the scene of the accident?

A. The first couple miles one way or the other was partially flaked out or blowed out or worn out, but the last mile was almost completely covered.

Q. And what was it covered with?

A. Packed snow.

Q. Any ice? A. There must have been.

Q. Did you later on drive south of the scene of the accident? A. Yes, sir.

Q. Did you observe any substantial difference between the nature of the road north of the scene of the accident and the road south of the scene of the accident? [273] A. No, sir.

Q. And when you say that you are referring to that last mile? A. Yes, that last mile.

Q. Now when you got the, to the scene of the accident, who was with you?

A. A fellow by the name of Clifford Yost.

Q. Do you know where he is now?

A. I don't know his address, but he is in Maine.

Q. And did you stop at the scene of the accident?

A. Yes, sir.

Q. Can you arrive at an estimate of what time you arrived at the scene of the accident?

A. No, sir, I can't.

(Testimony of George F. Honeycutt.)

Q. Where were you located when you first knew there was an accident?

A. I believe we saw the smoke shortly after we turned on to the highway.

Q. The smoke, you don't remember seeing the smoke just as you turned on? A. No, sir.

Q. It was sometime after you came out to Highway 20 you saw smoke? A. Shortly.

Q. And did you immediately proceed south then to the scene of the accident?

A. Not too fast. It was kind of a slow process.

Q. And when you reached the scene of the accident, where did you turn your vehicle off? [274]

A. We left it on the road back.

Q. Back where? Can you point out on that map?

A. Well, I am not too familiar with these farm houses.

Q. That is Martin Lamb's driveway. Here is the irrigation lateral.

A. It would be along in here.

Q. So you stopped your car several hundred feet back of the scene of the accident? A. Yes.

Q. What was burning when you arrived at the scene of the accident?

A. The left-hand side of the bus; mostly at that time was the left-hand side of the truck, that is, the tires.

Q. And did you remain on the scene of the accident for some time? A. Yes, sir.

Q. Were you there before the Sheriff arrived, do you know? A. I couldn't say as to that.

(Testimony of George F. Honeycutt.)

Q. Were you there before either of the highway patrolmen, do you know?

A. I was there before one of the highway patrolmen.

Q. Do you know which one it was?

A. No, I don't, but he was driving a Ford panel.

Q. There was already a patrolman's Ford panel there when you arrived or he came after you did?

A. He came after I did.

Q. So if the other highway patrolman arrived after him, [275] you arrived before both of them?

A. Yes.

Q. But you don't know whether the Sheriff arrived on the scene? A. No, sir.

Q. Or the Under-Sheriff? A. No, sir.

Q. How long did you remain at the scene of the accident, do you know?

A. I remained there until they removed the bus off the road and also the trailer.

Q. Was there any indication when you arrived there that the vehicles had been moved prior to your arrival? A. They had never been moved.

Q. They never could have been moved, did you say? A. That is right.

Q. Why not? A. It was the heat.

Q. Did you assist in moving those vehicles later on? A. Yes, sir.

Q. And what did you do with reference to moving the vehicles? Did you help them in separating the tractor and the trailer? A. Yes.

(Testimony of George F. Honeycutt.)

Q. And were you there at the time they were actually separated? A. Yes, sir.

Q. Before you started to separate them had the fire always been too hot up to that time, is that the idea, to get near them? A. Yes, sir.

Q. And what if anything did you observe about the brake [276] connections between the tractor and the trailer when you went to move them?

A. We did not unhook any air connection to the trailer.

Q. And where were the air hoses that would ordinarily connect the tractor and the trailer?

A. On what I would call the possum belly.

Q. Where was that?

A. In front of the fifth wheel.

The Court: We will take a recess of five or ten minutes.

(4:55 p.m.)

(Court resumed at 5:00 o'clock p.m., at which time all counsel and plaintiff were present.)

Direct Examination

(Continued)

By Mr. Lush:

Q. I think when we adjourned for a few minutes you had just testified that the airbrake connections were in a box near the fifth wheel that you referred to as the possum belly, is that right?

A. That is right.

Q. Was there anything on top of that brake air hoses? A. Yes, there was a log chain.

(Testimony of George F. Honeycutt.)

Q. Was it possible for anybody to have been up in that area from the time you arrived at the scene of the accident [277] until you saw those airbrake hoses there? A. No.

Mr. Lush: You may cross-examine.

Cross-Examination

By Mr. Jameson:

Q. Mr. Honeycutt, as I understand it, you brought your truck to a stop some distance north of the scene of the accident; can you tell us about how far that would be from the scene of the accident? A. No, sir, I can't.

Q. Well now did you indicate on the map?

A. I believe I did.

Q. Now with reference particularly to this irrigation lateral now will you mark with the letter "E" on there approximately where you stopped? Now you have marked that the point some distance north of the irrigation lateral? A. Yes, sir.

Q. Now assuming, Mr. Honeycutt, that the irrigation lateral was 425 feet north of the scene of the accident and bearing in mind that the scale of this plat is 1 inch to 100 feet, can you tell us approximately how far from the scene of the accident you were when you brought your truck to a stop?

A. It would be approximately 2 to 300 feet.

Q. Two to three hundred feet north of it?

A. Of this. [278]

Q. Lateral? A. Yes, sir.

(Testimony of George F. Honeycutt.)

Q. Then that would be between six and seven hundred feet north of the scene of the accident?

A. I would judge that, yes. There is another approach there.

Q. And then I assume you walked from that point, did you, down to the scene of the accident?

A. I wouldn't say walked.

Q. What would you say? A. We run.

Q. You ran down? A. Yes.

Q. Now as I understand it you were driving a one-half ton truck and you came on to this highway about 3 miles north of the scene of the accident?

A. Yes, sir.

Q. And for the first two miles there was spotted snow, part of the highway clear and part with snow on it, is that correct? A. That is correct.

Q. And then for the last mile you say it was covered with snow? A. Yes, sir.

Q. Now what speed were you driving as you traveled that three miles?

A. Well, if there isn't any Pure Oil men in the house.

Q. We will guarantee that.

A. We were getting paid by the hour.

Q. You what?

A. We got paid by the hour and we drove [279] slow.

Q. You drove slowly because you were paid by the hour, is that correct? A. Yes.

Q. And about what speed were you driving?

A. Oh, I don't recall, probably 35 miles an hour.

(Testimony of George F. Honeycutt.)

Q. Probably 35 miles an hour?

A. Approximately.

Q. And you were taking that slow speed because of the fact you were paid by the hour, is that correct?

A. That is correct.

Q. Did you have any difficulty during that three miles you traveled as far as the highway was concerned?

A. No, sir.

Q. Did you run on to any ice?

A. Yes, sir.

Q. Did you slide any on the ice?

A. No, sir.

Q. Where did you find that?

A. A mile north of the accident.

Q. Now was it all ice from there on in, or spotted or what?

A. I believe, I know it was covered with snow, with packed snow.

Q. With what?

A. With packed snow.

Q. It was packed snow?

A. Yes.

Q. You couldn't see any ice?

A. I didn't look for it.

Q. Then you brought your truck to a stop back there some six or seven hundred feet; did you say there is a driveway there? [280] Did you have any difficulty bringing your truck to a stop back there?

Q. Did you have any difficulty bringing your truck to a stop back there?

A. None that I recall.

Q. I believe you mentioned that one of the highway patrolmen arrived after you reached the scene of the accident?

A. Yes, sir.

Q. From which direction did he come?

(Testimony of George F. Honeycutt.)

A. I don't know, sir.

Q. Well, you have recalled he drove a panel truck, is that what you said? A. Yes, sir.

Q. Where was that truck parked, if you recall?

A. He was on the other side of the bridge, backing up to the bridge, possibly to put bodies in; I don't know what it was.

Q. Do you know Mr. Ward, the Highway Inspector? A. Yes, sir.

Q. Now can you state whether he was there when you arrived? A. No, sir.

Q. You think one of them may have been and the other came after you arrived?

A. That is possible.

Q. You couldn't be sure of that?

A. No, sir.

Q. And I believe you said you didn't know whether the Sheriff was there at that time?

A. That is right.

Mr. Jameson: That is all.

Mr. Lush: That is all. [281]

FRED J. WICKAM

was called as a witness for plaintiff, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lush:

The Court: Is this a long witness?

Mr. Lush: No, your Honor.

The Court: How many more have you got?

(Testimony of Fred J. Wickam.)

Mr. Lush: Your Honor, I have I think three very brief witnesses and one that may take some time. I would guess an hour.

The Court: Very well, we will hear this witness.

Q. (By Mr. Lush): Will you state your full name, please? A. Fred J. Wickam.

Q. What is your occupation, Mr. Wickam?

A. Highway Patrolman.

Q. For what State? A. Wyoming.

Q. And did you investigate an accident that happened about 9 miles north of Worland on December 27th, 1946?

A. Yes, sir. I assisted in the investigation of it, your Honor.

Q. You came up from Thermopolis, I believe?

A. Yes, sir, I came from Shoshone that day.

Q. And you got the report of the accident at Thermopolis? [282]

A. About five miles south of Thermopolis.

Q. And you immediately came to the scene of the accident?

A. Yes, sir. I stopped in a house just a second and left immediately for the scene.

Q. And do you know what time you arrived at the scene of the accident?

A. Approximately a quarter to five.

Q. And do you know whether or not Keith Ward had arrived at the accident before that time?

A. He had.

Q. He was already there and you made an investigation of that accident in cooperation with

(Testimony of Fred J. Wickam.)

Keith Ward, Sheriff Nicola and Under-Sheriff Cooke, did you? A. Yes.

Q. And did you incorporate the findings of yourself and the remainder of them in one joint statement? A. In one report, yes.

Q. And do you have that report with you?

A. I have a microfilm copy of the report.

Mr. Goppert: If the court please, just a moment.

Q. (By Mr. Lush): You have a micro copy of that report?

A. Yes, a photostatic picture of the microfilm.

Q. Photostatic picture of the microfilm?

A. Yes.

The Court: What is that, a lengthy report?

Mr. Lush: It is four pages.

Mr. Goppert: Four pages. [283]

Mr. Lush: We will offer this in evidence.

The Court: Any objection to this report?

Mr. Goppert: No objection, if the court please.

The Court: Very well then, you offer it in evidence?

Mr. Lush: We offer in evidence Plaintiff's Exhibit No. 10.

(Whereupon said Plaintiff's Exhibit No. 10, being report of investigation of accident, offered and received in evidence, is a part of this record.)

Q. (By Mr. Lush): Is all the information that you have with reference to that accident or most of it incorporated in that report, Mr. Wickam?

(Testimony of Fred J. Wickam.)

A. I presume the most of it. The report here is made for the records of the State for what they require as a rule on their accident reports.

Q. And did you go north from the scene of the accident on that particular day? A. Yes.

Q. I would say just a short ways, possibly—oh, possibly about 150, 200 feet, maybe a little bit farther.

Q. Could you see north from that place?

A. You couldn't see so very far north. If I remember right there is a little hump in the road farther north there.

Q. Have you read this report recently, Mr. Wickam?

A. Yes, sir, I have looked at it and read it. [284]

Q. And you are in agreement with all of the statements made in that report with reference to how this accident happened?

A. How it was taken?

Q. Yes. A. Yes, sir.

Mr. Lush: You may cross-examine.

Cross-Examination

By Mr. Goppert:

Q. When you came to the scene of the accident you found the rear end of the bus at approximately three feet west from the west part or from the west edge of the road, did you not?

A. The rear end of the bus three feet from the west edge of the road?

(Testimony of Fred J. Wickam.)

Q. Yes. A. No, sir.

Q. Or was it from the banister of the bridge?

A. From the east banister of the bridge.

Q. You mean it was north and the rear end of the bus three feet from the east banister of the bridge?

A. It was about, the side of the bus the nearest point from the banister from the east banister or north side was about three feet from the bus.

Q. And was there room to pass it, the bus on the west? A. I wouldn't say that there were.

Q. You only examined the highway north of the scene of [285] the accident for a distance of approximately 200 feet?

A. Possibly 200 feet, right around 200 feet.

Q. Did you do that in company with Mr. Nicola, the Sheriff?

A. No, sir. He was standing there at the time I looked at it and he was around the bus and he was backward and forwards.

Q. Did he sign that statement with you?

A. This statement has never been signed.

Q. Well, did he concur in it with you?

A. Yes, he was there at the time we were making this statement out.

Q. And assisted in its preparation?

A. Yes, he was in and out of there as we all were at the time the statement was made and prepared here through our assistance by Inspector Ward at the time.

Q. Mr. Ward is the one who wrote it up?

(Testimony of Fred J. Wickam.)

A. He is the one that wrote the statement up.

Q. Did you observe a track north of the scene of the accident about 150 feet in length that circled from the west side to the east side of the highway? It didn't circle, it swerved?

A. It swerved, yes.

Q. Just where it swerved? A. I did.

Q. Quite a gradual curve, wasn't it?

A. Well, yes, it would be quite a gradual [286] curve.

Q. Now you had driven as I understand it from a point five miles south of Thermopolis to the scene of the accident after learning of the accident?

A. Yes.

Q. What speed did you take?

A. I drove pretty fast, probably between 60 and 75, even up to possibly 80 miles an hour at points between Thermopolis to just south of Worland.

Q. What did you find when you got to Worland?

A. I found ice.

Q. And did that continue, that ice just south of Worland to the scene of the accident?

A. Yes.

Q. Was that solid ice from Worland to the scene of the accident?

A. Well, I would call it solid ice across the road.

Q. And you didn't check up north of it, did you?

A. Not any farther.

Q. You did check up by talking with Mr. Keith Ward? A. Yes.

(Testimony of Fred J. Wickam.)

Q. And you found out from him there was no ice north of that little raise?

A. He stated that.

Mr. Lush: I object, hearsay, your Honor.

The Court: Yes.

Q. There was ice for a distance of 150 or 200 feet as far north as you looked north of the accident?

A. Yes, as I say as I walked there as far as I could see [287] north of the accident, ice and snow.

Q. And is it a fact or isn't it a fact that you were present when a conversation was had with Mr. Brownell that evening that is reported in that report?

A. It is a fact.

Q. You were present?

A. Yes, sir.

Q. Didn't Mr. Brownell make the statement that he was trying to slow down because he didn't want to meet the truck on the bridge?

A. Yes.

Q. He made that statement, didn't he?

A. Yes.

Q. And that was made at the Worland hospital?

A. Yes.

Q. That evening?

A. Yes.

Q. Around about 8:00 o'clock, was it not?

A. I don't know the time, possibly around eight; it might have been just a little later.

Q. And isn't it a fact that you had a talk with Mr. Hawkins, the driver of the defendant's truck, that same evening and that he told you he tried to stop in order to prevent passing the bus on the bridge, is that right?

A. Yes.

(Testimony of Fred J. Wickam.)

Q. About how fast could you drive going to the scene of the accident from Worland?

A. All the faster I did drive was approximately 30 miles an hour.

Q. And was it not a fact you were going just as fast as [288] you thought it was reasonably safe to go?

A. For me, yes.

Mr. Goppert: That is all.

The Court: We will suspend here and adjourn until tomorrow morning at 10:00 o'clock.

(5:30 p.m.)

(Court resumed, pursuant to adjournment, at 10:00 o'clock a.m. on May 18, 1949, at which time all counsel and plaintiff were present.)

The Court: Gentlemen, proceed with the case on trial.

Mr. Lush: It has been stipulated by and between the parties through their respective attorneys that the life expectancy of a man 35 years of age according to the American Experience Table of Mortality is 31 and 78/100ths years.

Mr. Goppert: That is agreed to.

The Court: Very well. [289]

* * *

ELDON COOKE

was called as a witness for plaintiff, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lush:

Q. Will you state your full name, please?

A. Eldon Cooke?

Q. And what is your address?

A. Worland, Wyoming at this time.

Q. And you have listened to the testimony with reference to this accident here? A. Yes.

Q. At the time of the accident what was your occupation?

A. I was Under-Sheriff of Washakie County.

Q. And as Under-Sheriff of Washakie County, did you go north to the scene of this accident?

A. Yes.

Q. Can you tell us about what time you went north?

A. Well, I arrived at the scene of the accident sometime around about 3:00.

Q. And did you just precede the Sheriff out there? A. Precede?

Q. Yes. A. Yes.

Q. And about how fast did you drive going to the scene of the accident?

A. Well, I drove from speeds varying from 35 to 50 miles an hour. [290]

Q. And did you have any trouble keeping your car under control doing that?

A. I believe my car was under control.

(Testimony of Eldon Cooke.)

Q. Did you examine the scene of the accident with the Sheriff? A. Some, yes.

Q. And did you observe the tracks of the truck going north to the Martin Lamb driveway, or the bus I mean, or the truck going from Martin Lamb's driveway down to the point of the impact, did you observe those tracks? A. I did.

Q. Is that a fair approximation of the tracks you saw going south from about Martin Lamb's driveway to the scene of the accident?

A. Yes.

Q. Did you stay at the scene of the accident, Mr. Cooke? A. Until about five o'clock.

Q. And can you state whether or not Patrolman Fred Wickam had arrived when you left the scene of the accident? A. Yes, I believe he had.

Q. Where did you go from the scene of the accident?

A. I returned to Worland to my home.

Q. Then did you again return to the scene of the accident? A. Yes.

Q. And what did you find the condition of the road to be back to the scene of the accident on your second trip as compared with what it was on your first trip?

A. Well, the road, it was much slicker, the snow had become [291] packed. It was actually rougher and it was colder, probably had frozen harder and I couldn't drive nearly as fast.

Q. On your second trip? A. Yes.

(Testimony of Eldon Cooke.)

Q. Did you trace the tracks of the bus from the scene of the accident?

A. Up to the scene of the accident.

Q. Or back south from the scene of the accident?

A. Yes.

Q. And did you observe the same thing the Sheriff did with reference to those tracks?

A. Well, at this time the only thing I could remember would be the right track of a dual track leading up to the bridge.

Q. And did you observe that dual track over on the shoulder of the road, is that right?

A. Well, it was either near the shoulder or on the oil edge. I didn't dig it up to see where it was at the time; I don't remember but I know it was at the very right edge of the highway.

Q. And how far north of the scene of the accident did you go?

A. To the Martin Lamb driveway.

Q. You didn't go any farther north then?

A. No.

Q. And how far north from that could you see the road?

A. Well, at the time I went to the Martin Lamb driveway [292] I was going to the Lamb house to see if there was anyone injured there and I don't remember looking in that direction.

Mr. Lush: That is all.

Mr. Goppert: No cross-examination.

GEORGE F. SINN

was called as a witness for plaintiff, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lush:

Q. Will you state your full name, please?

A. George F. Sinn.

Q. Where do you live, Mr. Sinn?

A. About 10 miles north of Worland.

Q. What is your occupation?

A. Farmer-Stockman.

Q. You have heard the testimony with reference to this accident and know the accident to which we refer, do you not? A. I do.

Q. When did you come upon the scene of the accident on that day?

A. Very shortly after it happened. I think I drove up the first vehicle driven to the accident after that.

Q. That is, the first vehicle from the north?

A. Yes.

Q. And did you observe the tracks and conditions and [293] positions of the vehicle and so forth and so on around that place? A. I did.

Q. About where did you stop your car, do you remember?

A. Well, I stopped my car north of the culvert. There is a crossing there into the field and the car was turned around there and the boys went back home after the fire extinguisher.

(Testimony of George F. Sinn.)

Q. And did you observe the tracks that had been made by the truck coming down from the north?

A. I did. I walked down those tracks to the accident.

Q. Calling your attention to Defendant's Exhibit No. 5, is that a fair representation of the marks that you saw on the road at the time when you walked down the road to the scene of the accident?

A. Yes, to some extent. There had been considerable travel since the accident and the time this picture was taken and also the wind apparently has blown snow into these tracks.

Q. In other words, the tracks are not as clear on that picture as you observed them, are they?

A. They are not.

Q. There is more snow in the tracks themselves in that picture than you observed then?

A. Yes, sir.

Q. Now, you say you followed those tracks down to the scene of the accident, did you follow; did you determine what tires or what wheels apparently made those marks by following them right up to the wheels? A. I did. [294]

Q. And what wheels did you follow those tracks to?

A. The tractor wheels were doing the snow plowing.

Q. And did you observe marks of the trailer wheels? A. I did.

Q. And where did those trailer wheel marks go

(Testimony of George F. Sinn.)

with reference to the tractor mark wheels that you have identified on there?

A. As I remember the trailer marks swung slightly to the east when the tractor brakes were set and followed slightly east most of the way down to where the tractor was off of the shoulder at that point nearly lined up pretty well with the tractor tracks off the shoulder of the road.

Q. Could you tell from examination of anything about the movement of the wheels of the tractor, or the trailer other than its direction from the appearance of the tracks?

A. Well, I would say they were rolling. They did not cut the snow and ice off the highway.

Q. Did the tractor wheels cut the snow and ice off the highway? A. They did.

Q. To a greater extent than is shown in Defendant's Exhibit 5?

A. Yes, sir. They were plumb black at that time.

Q. Did you examine the tires or notice the tires on the tractor and on the trailer when you arrived at the scene of the accident and looked at the vehicles?

A. I just looked at them as I went by. [295]

Q. Did the tires all appear to be in good condition? A. I think they were, yes.

Q. There were no obvious blowouts, were there?

A. No.

Q. Did you follow the tracks of the bus back south of the scene of the accident? A. I did.

Q. And how far back did you follow them?

(Testimony of George F. Sinn.)

A. To the Piel driveway, and from there I looked farther south, didn't follow them, just looked.

Q. You didn't follow them beyond that point and did you observe the tracks of the bus on the bridge or was the snow melted off the bridge when you arrived there?

A. No, when I was there the snow hadn't melted off yet.

Q. And were you able to follow those tracks?

A. Right up to the bus.

Q. And did you examine the area for tracks between the bus and the tractor?

A. Oh, I just looked at them.

Q. Did you see any tire marks between the bus and the tractor?

A. Between the bus and the tractor?

Q. Yes. Did the tractor marks show any farther south than the ultimate position where the tractor came to rest?

A. Oh, just slightly beyond, yes.

Q. About how far would you estimate?

A. In the neighborhood of a couple feet, maybe, maybe not quite that far. [296]

Q. And it appeared to you that sometime during the course of the movement of the tractor the rear wheels had gone two feet farther south than the ultimate resting place of the tractor, is that right?

A. Yes.

Q. And those skid marks you testified to con-

(Testimony of George F. Sinn.)

tinued right on under the tractor and two feet past it? A. Yes, sir.

Q. Now from how far north did you approach the scene of the accident?

A. Little better than half a mile.

Q. And what was the condition of the road along that half mile with reference to ice and snow?

A. There was ice on the road and it had snowed on top of the ice.

Q. And did you observe any difference between the condition of the surface of the road in this half mile there and the—that you drove your car—and the road over which you walked down to the scene of the accident? A. No, I didn't.

Q. Yesterday I believe Martin Lamb testified to the effect that there was a string of farm machinery from a point near Sam Piel's driveway down to the, down the fence line; did you observe that line of machinery down there? A. Yes, I did.

Q. How long did you remain at the scene of the accident?

A. Oh, probably five, a little after.

Q. And while you were at the scene of the accident was [297] any attempt made to move the tractor away from the trailer?

A. Yes. We tried to pull it away first with a light farm tractor but the wheels were still on the tractor and we waited then until the truck came out and moved it.

Q. And were you present when the truck moved it? A. I was.

(Testimony of George F. Sinn.)

Q. Did you observe whether or not the wheels on the tractor were locked or on the trailer were locked when an attempt was made to move the trailer?

A. No, I wouldn't be able to determine.

Q. What was the position of the bus tracks with reference to the east rail of the bridge crossing the bridge, that is, the right hand side going north?

A. They were close. The bus was very close to the rail. They were on the east side of the road.

Mr. Lush: You may cross-examine.

Cross-Examination

By Mr. Goppert:

Q. Mr. Sinn, you recall having testified at the taking of a deposition in other cases concerning this same accident? A. I do.

Q. At Worland, Wyoming, in December of 1947, do you not? A. Yes, sir. [298]

Q. And you recall testifying in a case in this court last week? A. Yes, sir.

Q. And at any one of those times did you testify to two sets of tracks, did you?

A. I don't believe I was asked that question.

Mr. Lush: Just a second. Will you show the witness the deposition if you are going to cross-examine him with reference to it? I think he is entitled to have the deposition in front of him.

The Court: Well, these are just preliminary questions. I expect he will show the deposition to the witness before he interrogates.

(Testimony of George F. Sinn.)

Mr. Goppert: If the court please, I won't be able to show the witness the transcript of the evidence given here last week but I will show him the deposition but I want to get down and see if we were in dispute on any point first.

The Court: Very well.

Q. (By Mr. Goppert): As I understand your present evidence it is to the effect that you were the driver of the first vehicle that came from the north to the scene of the accident following the accident?

A. Yes, sir.

Q. And that you stopped the car that you were driving north of the culvert? A. Yes, sir.

Q. That crosses the highway north of the Lamb driveway? A. Yes. [299]

Q. And that when you were shown Defendant's Exhibit 5 you say that is a fair representation of the tracks as you saw them there on that road excepting that it is dimmer?

A. The tracks have been filled some here.

Q. How, from blowing snow? A. Yes.

Q. And possibly some travel over them?

A. Could be, yes.

Q. You wouldn't say there had been travel over them?

A. I would say there had been travel over them.

Q. You would say? A. Yes.

Q. As you read that picture, that No. 5, you see evidence of two almost parallel tracks describing an arc almost diagonally across the highway, do you not? A. Yes.

(Testimony of George F. Sinn.)

Q. And as you saw them on the day in question you observed their approximate length, did you not? A. No, I didn't.

Q. You observed where those tracks went to, did you not? A. Yes.

Q. As I understand your evidence now you did—were there any other tracks on the highway coming from the semi-trailer other than the two which you say are a fair representation of the tracks as you saw them?

A. Yes, there were other tracks.

Q. Coming from this vehicle?

A. I think they were, yes. [300]

Q. And do they show on that exhibit anywhere?

A. No, they don't.

Q. Handing you at this time a picture that was used in the deposition at Worland, No. 14.

Mr. Goppert: We would ask that this be marked as Defendant's Exhibit No. 11.

Q. You recall, do you not, having had exhibited to you at the time of your evidence taken or given at Worland in December, 1947, this picture which is now marked Defendant's Exhibit No. 11?

A. I do.

Q. And handing you another picture which was marked in the taking of the depositions at Worland as No. 16, and now bears Defendant's Exhibit No. 12, do you recall having been shown that picture in the taking of your deposition in Worland?

A. Well, now, I am not sure. I seen some of

(Testimony of George F. Sinn.)

those pictures. That picture looks very near like the last one you showed me.

Q. Yes, they are quite a lot alike.

A. I don't know whether I seen both of those pictures or just one.

Q. Perhaps your memory can be refreshed by reading the deposition. Directing your attention to page 3 of the deposition, of the transcript of the testimony you gave at Worland in December of 1947, I wish you would read with me the portion [301] that has to do with the tracks, and at the same time watch those exhibits when they are referred to in your deposition so that you can have your mind refreshed on it and see if this is correct. Do you know the place that was mentioned by one of the witnesses here that there is a culvert under the highway north of the Martin Lamb house? Answer: I do.

Q. With reference to that point where did you notice the markings on the roadway? Answer: Well, it could have been just a short distance south but right close to that culvert.

Q. You describe the marks from that point leading to the point of the accident? Answer: Where the tires were the snow and ice was all cut off and the road was black right here from the west to the east and then apparently straightened out and then swung over into the barrow pit. You recall all that evidence, don't you? A. Yes.

Q. Then the next question: Into the barrow pit on which side of the road? Answer: East side.

(Testimony of George F. Sinn.)

A. Yes, sir.

Q. And then the next question was: I call your attention to Plaintiff's proposed Exhibit No. 14—now that is this one that is now marked Defendant's Exhibit 11—and P.D. No. 16, that is this other one that is marked No. 12. Now, showing you Plaintiff's proposed Exhibit No. 14—directing your attention to Defendant's No. 11—I will ask you whether [302] or not you recognize that picture? Answer: I do.

Q. You so testified at that time, didn't you?

A. Yes, sir.

Q. And the next question was: And do you recognize upon that picture the marks or any marks you say you saw on that occasion? Answer: I can see the marks of a trailer there. That is, on this No. 11.

Q. And the next question was: Can you indicate those to me, please? Your answer was: I would say that was the trailer. You pointed to the set of tracks at that time and will you point to the set of tracks that you said was the trailer tracks at that time? Will you mark that with your initials, please? They have already got S.D. on them in two places. You scratch the SD or put your initials under the SD that you indicate is the trailer track.

Q. Now you have marked the trailer tracks as GS, have you not?

A. That is right. Now this track 2 I think was made by the truck tractor.

Q. Now which track?

A. The one that I marked.

(Testimony of George F. Sinn.)

Q. You believe that is a combination track?

A. I believe that is a combination track, yes, sir.

Q. Of both the truck and the trailer?

A. Of the left side of the truck and the right side [303] of the trailer at this point.

Q. And then that track would be the same as the one that is marked (1) on this Plaintiff's Exhibit 5, would it not? A. Yes.

Q. Now then your best evidence is or your best recollection now is after exhibiting, I mean after examining Defendant's Exhibit No. 5 and Defendant's proposed Exhibit 11, is that the (1) mark on No. 5 and this one that you have just marked GS on No. 11 are the same track and that they are the combination track of the trailer and the truck?

A. At this point where I marked. Not back here on this picture.

Q. They got into the same track?

A. At this point, yes.

Q. Closely. A. Closely.

Q. Down in toward the vehicles that was a combination track? A. Yes.

Mr. Goppert: If you want him to, we can have him mark it on the big one. Possibly we had better not confuse him right now but before we get through we will have him mark that one.

The Court: As an enlargement of this exhibit; as an enlargement of that same exhibit.

Mr. Goppert: If we might deviate enough to do

(Testimony of George F. Sinn.)

that right now on my regular examination [304] here.

Q. (By Mr. Goppert): Handing you a photograph which is marked Defendant's Exhibit 13, I am advised is an enlargement of this Defendant's Exhibit No. 11, do you recognize that to be an enlargement of No. 11? A. This one isn't.

Q. I want to correct my statement there. I am informed this is an enlargement of the old P.D. 16. Do you recognize that as the enlargement of the P.D. 16 that was in the deposition at Worland?

A. What have they got here?

Q. Oh, just a spot?

A. Well, it could be the same picture as far as I know.

Mr. Goppert: I would be willing to stipulate it was the same with counsel. He was worried about that spot.

Mr. Lush: I will stipulate.

Mr. Goppert: We will offer in evidence at this time Defendant's Exhibit 13 and stipulate that it is an enlargement of No. 16 that appeared in the Worland deposition.

The Court: Very well, let the record show.

(Whereupon said Defendant's Exhibit No. 13, being a photograph, offered and received in evidence, is a part of this record.)

Q. (By Mr. Goppert): Handing you Defendant's proposed Exhibit 14, which I am advised is an enlargement of Defendant's proposed [305] Ex-

(Testimony of George F. Sinn.)

hibit No. 11, which showed the number P.D. 14 in the Worland exhibit, will you state if you recognize that to be an enlargement of the P.D. 14?

A. Yes, I believe it is.

Q. Now that has on it two marks "SD," do you recognize those markings as showing the two tracks that appear on Defendant's 5?

A. I believe they are.

Q. Will you mark the one that you identified at Worland as being the trailer track on that proposed Exhibit No. 14?

A. I am going to mark both sides of this, I believe.

Q. You believe both of them are trailer tracks?

A. This one and this one.

Q. And will you make that same mark on No. 11? When you testified at Worland you indicated only the two tracks that are marked SD, did you not, on this No. 14; I mean on this PD No. 14, which is now numbered 11?

A. What was that question?

Q. When you indicated those trailer tracks on that exhibit which was marked PD 14 at Worland, you marked, you indicated the two that had been marked SD, did you not?

A. Those are the tractor marks.

Q. That is what you say now but didn't you testify, when you were testifying here you pointed them out and you pointed out the two tracks that had already been marked SD?

A. No, not as the trailer marks; that trailer

(Testimony of George F. Sinn.)

couldn't possibly get from these two lines over here without leaving [306] some sign of it.

Q. There was no sign there?

A. No, not from that point.

Q. Now you are sure that this one you have just marked on the left hand corner of Exhibit 11 and on the lower left hand corner of 14 is the marks you pointed out at Worland as being the trailer marks?

A. If I pointed them out at all those are the tracks.

Q. You were asked these other two questions here in this same place. The answer you have given to the previous question about seeing trailer marks: I can see the marks of the trailer there.

A. Yes.

Q. And the next question was: Will you indicate those to me please? And your answer: I would say that was the trailer. Q. Do you see any other marks? A. Yes, you could see a mark here. And the question was: When you say "here," is that to the right of the marks behind the trailer? And your answer was: It is.

Q. And wasn't that the one that you indicated by one to the right? A. Absolutely.

Q. Well, you didn't indicate any other marks at that time, did you? You didn't indicate this one over in the lower left hand corner of the exhibit at that time?

A. I don't remember whether I did or whether I didn't. [307]

(Testimony of George F. Sinn.)

Q. You were asked on cross-examination by attorney Rice for the Burlington in that same deposition this question: If I correctly understand these pictures, P.D. 16 and P.D. 14—that is these same two we are talking about—that is correct—right after the accident the trailer and tractor truck is occupying almost the entire highway? Your answer: No, the trailer is off in the barrow pit and the tractor is occupying about half the highway?

A. Yes, sir.

Q. The mark that leads to the rear of the trailer wheels in these pictures P.D. 16—and then he says P.D. 17 and he must be wrong on that because there isn't any P.D. 17. A. I can't see any.

Q. He must have referred to 14 and 16. Where is that with reference to the east side of the highway? Answer: It is off the highway. Is that right? Was that your answer? A. That is right.

Q. How far off? Answer: Possibly three feet, maybe more.

Q. And then the next question? The mark extending toward us in the picture from the rear wheels of the trailer is three or more feet east of the side of the highway? He refers to it as a mark?

A. Yes.

Q. Answer: Off the oil mat. [308]

A. Yes.

Q. Then the next question was that the other mark, I believe you said that to be the mark of a tractor wheel here. Is that out next to the oil mat of the highway? And your answer was: I would

(Testimony of George F. Sinn.)

say it was very close to the edge of the picture.

Q. Which edge? A. East edge.

Mr. Lush: I would say it is very close to the edge from the picture.

A. That is right.

Q. And which edge? A. East edge.

Q. The right hand side going north? Answer: Yes.

Q. Is that right?

A. That should be the right hand side going south, shouldn't it?

Q. If you read it carefully, I think.

A. What mark is that supposed to be; what mark are we talking about?

Q. That is the one to the right hand side of the two lines that were marked at Worland, S. D.?

A. Yes.

Q. Then he goes on and asks you this question: Speaking of the tractor we didn't make that plain. Let's take the rear end of the tractor as shown by the pictures P.D. 14 and 16, where is the rear end of the tractor with reference to the east side of the oilmat? Answer: It is east of the oilmat. [309]

Q. That is correct, isn't it?

A. Yes, sir.

Q. And the rest of the tractor extends up on the oilmat and toward the west side of the highway? Answer: Yes, sir.

Q. I believe that I have read you all of the references you made to tracks in your deposition given at Worland, and was there anything in that

(Testimony of George F. Sinn.)

that told about three sets of tracks or three tracks?

A. I believe there was.

Q. Would you point it out?

A. I don't remember of no three being indicated, no.

Q. There was two tracks that were marked on there S.D. on those two exhibits at that, were they not? A. They were.

Q. And don't you recall now that those were the only two testified to by you in that hearing?

A. I wouldn't say whether I mentioned them or the others.

Q. You won't say you mentioned any other except the two?

A. I can't remember whether I did or I didn't.

Q. Well, you testified here in court last week and you identified two tracks, did you not?

A. Skid tracks.

Q. Just two and now you are testifying to three, is that it?

A. Well, this other isn't a skid track, I wouldn't say.

Q. Well, it is another mark of the vehicle?

A. Yes.

Q. Up to today you have never mentioned that third [310] mark, have you?

A. Well, you sure couldn't deny that there are three lines on this picture.

Q. Well, had you ever mentioned it in your evidence given in the deposition at Worland or here in this court in this other Stotts and Foster case?

(Testimony of George F. Sinn.)

A. I don't remember whether I did or whether I didn't.

Mr. Goppert: We want to offer in evidence, if the court please, Defendant's Exhibits 11, 12, and 14.

Mr. Lush: No objection.

The Court: They may be received in evidence.

(Whereupon said Defendant's Exhibits Nos. 11, 12 and 14, being photographs, offered and received in evidence, are a part of this record.)

Q. (By Mr. Goppert): Mr. Sinn, now this third track was almost parallel to the other two?

A. It varied.

Q. It varied; you mean part of the places it was wider from the two tracks? A. Yes.

Q. Was there evidence of four tracks to the north; I mean will you add one more?

A. I don't believe I will.

Q. You say there were three and that the middle one you say was a combination of tractor and trailer track?

A. Where it came to rest, yes.

Q. The tractor tracks you say didn't cut the snow and ice [311] off the highway or was it the trailer tracks that didn't?

A. The trailer tracks didn't.

Mr. Goppert: That is all.

Mr. Lush: That is all.

The Court: We will take a few minutes recess.

(11:00.)

(Court resumed at 11:10 o'clock a.m., at which time all counsel and plaintiff were present.)

The Court: Proceed, gentlemen. [312]

* * *

Mr. Goppert: Now, if the court please, on account of the convenience of the witnesses and to get several of them away promptly I want to call some of them a little out of order. Dr. Walker.

DR. M. B. WALKER

was called as a witness for defendant, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Goppert:

Q. State your name.

A. Dr. M. B. Walker.

Q. Where do you reside?

A. Basin, Wyoming.

Q. How long have you lived in that community?

A. Thirty years.

Q. What is your occupation?

A. Well, I am field representative for the Great Western Sugar Company.

Q. Do you hold any official position in the state of Wyoming? A. State Representative.

Q. In the State Legislature?

A. Yes, sir.

Q. And are you an officer of the town of Basin?

A. On the Town Council.

(Testimony of Dr. M. B. Walker.)

Q. Councilman? A. Yes, sir.

Q. And did you have occasion on December 27th, 1946, to make a trip to Worland, Wyoming?

A. Yes, sir. [315]

Q. Will you state what the occasion was, how you happened to go?

A. Well, about—we had a funeral in Basin that day and when we came back from the cemetery I went to Mrs. Booker and she told me about this bus accident in which her daughter was one of the victims. My daughter was home from Great Falls at the time and she is a registered nurse and had gone to school with this Booker girl from the first grade on up, so when I went home and told her she said: "Well, put some clothes in a grip and let's go to Worland, Marian may need me." So I took she and her husband down to Worland.

Q. Was that Marian Whiston? A. Yes.

Q. Is she the wife of Mr. Whiston who testified in this case? A. Yes, sir.

Q. Can you place the approximate time that you left for Worland from Basin?

A. It was between four and four thirty; I would say around there sometime.

Q. What kind of car do you drive?

A. Chevrolet.

Q. Who went with you?

A. My daughter and her husband.

Q. And did you observe the condition of the highway as you drove down to the scene of the accident? A. Yes, sir.

(Testimony of Dr. M. B. Walker.)

Q. How far approximately is it from Basin to the scene of that accident? [316]

A. Oh, it must be about 22 or 23 miles.

Q. Would you approximately locate the accident from Worland how far?

A. Well, I don't know. I think that place is around 9 or 10 miles.

Q. How would you describe the location of the accident?

A. Well, it is right by the old Chatfield place.

Q. Well, the Arthur Chatfield place, is that the one now occupied by Martin Lamb?

A. Right by the Eccles Beet Company.

Q. And that is the so-called, I think it is referred to in here as a piler, where a piler was located?

A. That is right.

Q. That was a beet piler, was it not?

A. Yes.

Q. And that, of course, is U. S. No. 20, is it not?

A. Yes, sir.

Q. Will you state the speed at which you traveled from Basin to the scene of the accident?

A. Well, I was going 75 miles or better.

Q. Did you find any bad road before you got to the scene of the accident?

A. No. No, sir, I didn't.

Q. Did you happen to pass any Highway Patrolman en route?

A. Yes, sir.

Q. Who was it if you know?

(Testimony of Dr. M. B. Walker.)

A. A fellow by the name of Ward. [317]

Q. And when you got to the scene of the accident did you find any vehicles on the highway?

A. In front of me?

Q. Yes. I mean that had been in an accident?

A. Well, yes, the truck and bus were off the side of the road ahead of me.

Q. Was there anybody flagging traffic down at that time? A. Yes, sir.

Q. Was he the one that stopped you at the scene of the accident, the fellow that flagged you down?

A. Yes, sir.

Q. Do you recall that there was ice near the scene of the accident?

A. Well, I started to slow down, I would say, 350, 400 feet north of the accident and there was some snow and skidded a little bit before I stopped.

Q. And was there some natural objects there that you can locate the approximate place where you hit that snow?

A. There's trees on the west side of the road.

Q. Is that the road just west of the Martin Lamb residence, the old Arthur Chatfield place?

A. Yes, sir, the road runs north and south in front of the Martin Lamb residence.

Q. The road takes a north and south course there? A. The trees are on the west.

Q. The trees are west of the roadway?

A. Yes. [318]

Q. And could you located with reference to this Plaintiff's Exhibit 1 the approximate location of

(Testimony of Dr. M. B. Walker.)

where that ice and snow started as you observed it coming down on that drive that afternoon?

A. Well, I didn't notice the road being slippery or anything until I started to slow up at the time the man was flagging me.

Q. You knew then you were on ice?

A. Well, I knew it was a little bit slippery. It's when I started to slow up.

Q. That is the only time you had any skid on the way down there that day?

A. I drove approximately 75 to 80 miles an hour all the way.

Q. And was it safe driving as you figured?

A. Yes, sir.

Q. When you came to a stop there did you observe or did someone else come up shortly after and talk to you?

A. Highway Patrolman came up.

Q. Was he behind you; was that this same Mr. Ward?

A. Yes, sir.

Q. And he told you to slow down or something of that kind?

A. Oh, he kind of bawled me out a little bit.

Q. For your speed, was it?

A. Yes, sir. [319]

Q. What is the State limit on speed in Wyoming?

A. 60 miles.

Q. You had exceeded that?

A. Yes, sir.

Q. Believing it was an emergency?

A. Well, I had a registered Red Cross Nurse

(Testimony of Dr. M. B. Walker.)

with me and I believed it was an emergency and I wanted to get her to the hospital.

Q. And did you go in the course of time to the scene of the accident to the hospital?

A. Yes. We turned to the right and went down the railroad track to get by the bridge.

Q. You couldn't go by the bridge on account of this debris of the wreck of the accident?

A. Yes, sir.

Q. Was the outfit still burning?

A. Yes, sir.

Q. Do you know where you came back to the highway south of the accident?

A. About a mile south.

Q. And at that point what was the situation with reference to that highway from there into Worland?

A. Well, there was more snow and the road was rougher.

Q. Were the roads rough? A. Yes.

Q. Would you say bumpy?

A. Yes, they were.

Q. What was that caused by if you noticed?

A. Well, there was more snow south of the accident where we came back on the road.

Q. Did you still continue to drive as fast as you thought [320] was safe after that?

A. I was following another car. I stayed behind them.

Q. And about what speed did you take after you had the highway from there on into Worland?

(Testimony of Dr. M. B. Walker.)

A. I would say 35 to 40.

Q. Did you skid any going at that speed?

A. No, sir.

Q. And where did you stop at Worland?

A. Hospital.

Q. Did you find out who this car was in front of you?

A. I knew who it was when we were behind it.

Q. Who was it?

A. Mr. Booker and his wife.

Q. That was the father and mother, was it not, of Mrs. Whiston? A. Yes, sir.

Q. When did you come back from Worland to Basin? A. About seven o'clock that night.

Q. That same night? A. Yes, sir.

Q. At that time had the road been opened up at the scene of the accident? A. Yes.

Q. Did you come back past the scene of the accident? A. Yes, sir.

Q. And in driving back to Basin from Worland what did you find the condition of the highway to be from Worland to the scene of the accident?

A. Well, we drove about the same speed. The road was about the same as when we went down.

Q. You mean 35 miles an hour?

A. 35 to 40.

Q. What did you find the condition to be north of the [321] scene of the accident?

A. Well, we stopped at the accident for probably five to ten minutes and then we got in and drove on. I imagine we drove 50 to 60 and on up.

(Testimony of Dr. M. B. Walker.)

Q. You didn't have any trouble going that speed north of the accident? A. No.

Q. Did this ice condition continue down past those trees north of the accident on the road?

A. Yes, it did.

Q. Was there a definite difference in the highway as between the roadway north of the trees and the roadway south of the trees at the scene of that accident? A. Yes, there was.

Q. And did you make a trip back over the same roadway the next day?

A. I went down there about eleven o'clock.

Q. That would be on a Saturday morning, would it not? A. Yes.

Q. And what did you find the condition of the highway to be with reference to its condition the afternoon before?

A. Well, we had about five or six inches of snow in Basin that night. About four miles south of Manderson the road had quite a bit of snow on it; from there on down there was no snow.

Q. And there was no snow from four or five miles south of Manderson to the scene of the accident? [322] A. Just a skiff.

Q. And did you find the conditions the same the next morning at the scene of the accident so far as this good road and the icy road was concerned?

A. Well, we didn't drive as fast going down, I know that.

Q. Well, was the road conditions the same, that

(Testimony of Dr. M. B. Walker.)

is, did you meet the changed condition in the highway at the approximate place of those trees?

A. Just about the same.

Mr. Goppert: You may inquire.

Cross-Examination

By Mr. Lush:

Q. Doctor, you said you started to slow down three or four hundred feet north of the scene of the accident?

A. Yes, sir, when I saw this fellow flagging.

Q. Yes. Do you know who it was that was flagging? A. No, I don't.

Q. You don't know who that was and you say that you started to slide at about the Lamb driveway, is that about right?

A. Well, I think it was a little north of there.

Q. You think it was maybe a little north of the Lamb driveway you started to slide. Where was this man flagging? [323]

A. He was standing right near the gate, right next the gate that turned in the right into that man's yard where we detoured.

Q. He was standing right next this gate. Now this is the Martin Lamb driveway on the east side?

A. I would say he was standing between the two somewheres.

Q. I see, somewhere between those two drives?

A. Yes.

Q. And he was flagging and you slowed down because you were flagged down?

(Testimony of Dr. M. B. Walker.)

A. Well, I slowed down because we were flagged down and that is about as close as you could get to the scene of the accident.

Q. And before you started to slow down because you were flagged down, how fast were you going?

A. I would say I was going 75 miles an hour.

Q. Then approaching this spot up here you were going 75 miles an hour? A. Yes.

Q. Did you lose control of your car?

A. No.

Q. Did you go off the road?

A. No, sir.

Q. Did you have any trouble keeping your car on the road? A. No, sir.

Q. Did you observe this irrigation culvert up here just north of the scene of the accident?

A. No, I didn't.

Q. That creates the high spot in the road that is indicated by this map? A. I did not. [324]

Q. You didn't observe that. How far north of the flagman did you start to slow down?

A. Well, I couldn't. I would say three or four hundred feet, maybe five hundred, I don't know. When I see him out there waving I started to slow down.

Q. Now, Doctor, was there any snow on the highway north of the scene of the accident?

A. Not that I remember.

Q. It was clear entirely from shoulder to shoulder until you got right down to the scene of the accident?

(Testimony of Dr. M. B. Walker.)

A. Well, as far as I remember. Now it was, I know it was not dangerous driving at that speed.

Q. Now do you remember that there was snow on the highway or there was not snow on the highway?

A. I don't think there was snow on the highway.

Q. You don't think there was snow on the highway?

A. I don't know.

Q. Do you know whether there was snow on the highway?

A. I wouldn't say there was or was not. I didn't notice at the time.

Q. You didn't notice at the time there was snow on the highway; did you notice there was ice on the highway?

A. Not until I got right down close.

Q. As you approached the scene of the accident from the north do you remember whether or not the road is straight [325] or it is crooked say for two miles?

A. Well, there is a curve about a mile north of the accident.

Q. About a mile north?

A. Offhand just as remembering it I would say it was about a mile north, and there is a sharp turn, corner there.

Q. About a mile north?

A. That goes northeast.

Q. And did you have any occasion to slow down

(Testimony of Dr. M. B. Walker.)

between the time you came around that sharp curve and the scene of the accident?

A. Well, between——

Q. The time you came around the curve and you started to slow down because you were being flagged down? A. No, I didn't.

Q. Did you have any occasion to turn your car from side to side? A. No, sir.

Q. In other words, you were driving on the highway——

A. Right in the center of the road.

Q. So you actually can't say whether the road condition was slippery there, can you, because it would be only when you put on your brake or turned side to side that you would notice the road was slippery?

A. I didn't put my brakes on until I started to stop.

Mr. Lush: That is all. [326]

O. R. BOOKER

was called as a witness for defendant, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Goppert:

Q. State your name. A. O. R. Booker.

Q. Where do you reside, Mr. Booker?

A. Basin, Wyoming.

Q. How long have you lived at Basin?

A. About 30 years, 29 years.

(Testimony of O. R. Booker.)

Q. What business are you engaged in?

A. I am Postmaster.

Q. At what place? A. Basin, Wyoming.

Q. And have you been employed in that Post Office for a considerable period of time?

A. About 14 years.

Q. Are you the father of Marian Booker Whiston? A. I am.

Q. Do you remember that she was involved in an accident on, while riding in a bus on U. S. Highway 20 between Worland and Basin?

A. I do.

Q. And can you place the time and the date?

A. I do not know the exact date. The time of day I recall taking off between three or four in the afternoon.

Q. Was it two days after Christmas, December 27, 1946? [327]

A. Yes, right after Christmas.

Q. And about what time did you get the word?

A. Oh, between three and four o'clock.

Q. And you were at the Post Office when you got it? A. I was.

Q. What did you do immediately after getting that word?

A. I dropped my work and prepared to go to Worland.

Q. How long did it take you to go or get going?

A. Twenty minutes perhaps.

Q. Who went with you? A. My wife.

Q. What kind of vehicle did you drive?

(Testimony of O. R. Booker.)

A. Chevrolet sedan.

Q. And what speed did you take?

A. Oh, we took a moderate speed. I would say 50, 60 miles an hour perhaps, not over 60.

Q. Did you observe the road conditions as you went to the scene of the accident? A. Yes.

Q. And what was the situation north of the accident from Worland to the scene of the accident, or Basin to the scene of the accident?

A. The road was clear and free of any ice or snow.

Q. And did you come up on ice or snow at the scene of the accident or somewhere near there?

A. Yes.

Q. About how far from the scene of the accident did you strike that? [328]

A. As I recall it was around 500 feet.

Q. And did you notice any natural objects near there that you could place it with reference to?

A. Trees on my right going.

Q. Did those trees on the right of the highway indicate approximately where the ice and sleet conditions started? A. As I recall it, yes.

Q. Do you know the names of land owners there adjacent to that corner?

A. I don't know any except I am familiar with the Lamb place; that is the only land owners I know.

Q. Was it just west of the Lamb residence?

A. Just across the road.

(Testimony of O. R. Booker.)

Q. And that is the Martin Lamb residence, isn't it? A. Yes.

Q. And when you got to the scene of the accident did you stop there?

A. Just slowed up is all.

Q. What caused you to slow up if you know?

A. Well, there was confusion there at the scene of the wreck and then this flagman. The Highway Department had there a man belonging to the Highway Department personnel.

Q. Do you know where that man was located, that flagman?

A. Well, he was where I turned up to the right but I can't say definitely where it was.

Q. Was the turnoff to the right of the [329] accident?

A. He directed us down through a field.

Q. Did it go into a vacant house there, a house on the west side?

A. I remember it went through a little farm yard.

Q. Then do you remember where you came back on the highway south of it?

A. I would say possibly a mile south of the scene of the accident.

Q. And did you observe what the road condition was after you hit U. S. 20 from there on into Worland? A. Yes.

Q. What was it?

A. It was icy and sheet ice on the highway and the road in places it made it bumpy, rough.

(Testimony of O. R. Booker.)

Q. And that condition extended clear from that place then a mile south of the accident to the town of Worland? A. It did.

Q. You, of course, went to some place in Worland, did you? A. We went to the hospital.

Q. When you arrived there did you observe anybody else come in, arrived there at the same time or approximately?

A. Dr. Walker was right behind me. I didn't know it until I got to the hospital; he and his daughter and son.

Q. What time did you come back north from Worland to Basin?

A. Oh, it was midnight or afterwards.

Q. Did you use U. S. No. 20 going back?

A. Yes, sir. [330]

Q. And at that time what was the condition of this highway from Worland to the scene of the accident? A. It was icy. Ice on it.

Q. Was it bumpy? A. Rough, bumpy.

Q. And what speed did you travel?

A. Very moderate, 35, maybe 40.

Q. Was that the speed you used going into Worland after you got back on U. S. 20 south of the scene of the accident when you went down?

A. Approximately, yes. Very moderate speed.

Q. And did you observe when you came back whether this same icy condition existed north of the scene of the accident for as I believe you said some 500 feet?

(Testimony of O. R. Booker.)

A. Well, I suppose it did. I wasn't thinking much about that. There was icy conditions.

Q. Did you drive faster north of the scene of the accident from Worland than from Worland to the scene of the accident? A. Yes.

Q. Did you observe anything in the highway that would impede your driving?

A. North of the scene of the accident?

Q. Yes.

A. No, not until we got near Manderson which is south of Basin and then there was quite a heavy snow storm. We were in a heavy snow storm that night.

Q. From Manderson south?

A. Yes. [331]

Q. That Manderson is located how far south of Basin? A. Eleven miles south.

Q. Did you observe any landmarks near the road as you drove down that afternoon that would give you the approximate location of some natural object with reference to the place where the road was good and where it became icy?

Mr. Lush: Objected to as repetitious. He testified to that a moment ago.

The Court: Yes, the trees.

Mr. Goppert: Did he testify to that?

Q. (By Mr. Goppert): Were you acquainted with the names of the people that lived there?

A. No, sir.

Q. How did you locate that corner where the accident is?

(Testimony of O. R. Booker.)

A. I would locate it by the bridge, the highway bridge.

Q. You observed that bridge before and since, have you not? A. Yes.

Q. And did the accident happen right at that bridge across the roadway?

A. Just north of the bridge; just right on the bridge, you might say.

Q. And did you come back to Worland or drive back to Worland on the Saturday morning?

A. Yes, sir.

Q. About what time? [332]

A. Oh, we perhaps left Basin around nine o'clock.

Q. And got to Worland about what time?

A. Well, I expect it took us an hour or better, probably ten thirty.

Q. Now, with reference to the highway from your, this place five miles south of Manderson where you said you got in a snow storm the night before down to the place you indicated was 500 feet north of the scene of the accident would you state whether that road was clear of ice and snow?

A. The following morning?

Q. Yes. A. Yes.

Q. And what was the conditions then from the place where you had gotten on the snow and ice the afternoon before?

A. Just the same as the afternoon before; it was still rough.

Q. It was still rough and icy? A. Icy.

(Testimony of O. R. Booker.)

Q. Did that condition continue clear on into Worland that Saturday morning? A. Yes.

Mr. Goppert: That is all.

Cross-Examination

By Mr. Lush:

Q. Now, Mr. Booker, as I understand your testimony, you say that the ice and snow started at these trees here, [333] is that right? The trees opposite Martin Lamb's driveway, is that right?

A. Yes.

Q. And the highway north was clear of snow and ice? A. That is right.

Q. Now is that literally true? I mean is it literally true that this road was completely covered with snow and ice up to those trees and there was no snow north of that?

A. There was ice and snow on the road.

Q. Yes. Was there ice and snow north on the road? Was there an abrupt cut off where we have ice and snow here and we turn back and there was no ice and snow, is that literally true?

A. Yes, sir.

Mr. Lush: That is all.

W. V. DOLEZAL

was called as a witness for defendant, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Goppert:

Q. State your name.

A. W. V. Dolezal.

Q. Where do you reside?

A. Basin, Wyoming.

Q. What, if any, what is your occupation?

A. Court Reporter.

Q. Are you the Official Court Reporter of the Fifth Judicial District of Wyoming?

A. I am. [334]

Q. The District Judge is P. W. Metz?

A. That is right.

Q. And how long have you held that position?

A. A little over fifteen years.

Q. And your residence has been at Worland all that time?

A. At Basin.

Q. And that District comprises the Counties of the Big Horn Basin, does it not?

A. It does. Four.

Q. You are acquainted with U. S. No. 20?

A. I am.

Q. And also acquainted with it at the time of this accident in question?

A. I was.

Q. Did you have occasion to go to the scene of the accident from Basin and down to Worland on the morning following the accident?

A. I did.

(Testimony of W. V. Dolezal.)

Q. That was a business trip, was it?

A. It was.

Q. Would you state if you observed the condition of the highway from Basin to the scene of the accident and also from the scene of the accident to Worland on the way down that morning?

A. I did.

Q. And what was that condition?

Mr. Lush: I object, your Honor. It is too remote, the day after the scene of the accident. The nature of the road might have been substantially changed.

The Court: Well, we have testimony here that conditions were the same in the afternoon, evening, late at night and the following morning and I think it would be proper to [335] allow him to testify.

Q. Go ahead.

A. The road up to the trees there opposite the Lamb place were good; from the Lamb place on they were icy and worse from all the way into Worland.

Q. Gradually worse all the way in?

A. There was heavier ice from there on into Worland.

Q. Would you describe that surface condition of the roadway from the trees west of the Lamb place on into Worland?

A. Well, there was icy condition of the road opposite the trees and probably 450 to 500 feet north of the scene of the accident and the road was

(Testimony of W. V. Dolezal.)

choppy for a few miles right now, I mean right south of the scene of the accident.

Q. You mean by "choppy" bumpy?

A. Bumpy and icy.

Q. Would you be acquainted with the legal speed of motor vehicles in Wyoming? A. I am.

Q. 60 miles an hour? A. Yes.

Q. From what you saw of the highway that Saturday morning was that a safe speed north of the trees west of the Lamb place on U. S. No. 20?

A. North of the Lamb place, yes. I traveled from 50 to 60 miles.

Q. And south of there would that have been a safe speed?

A. No, I am sure it wasn't. I didn't feel that it was. [336]

Q. Did you slow down?

A. I did coming and going both.

Q. You went back on it the same day?

A. I think I did late that night.

Q. Was the condition still the same that Saturday night?

A. Yes, and the next Monday morning.

Q. You had occasion to travel it all those times?

A. Yes.

Q. Going from Basin to a place about five miles south of Manderson you were in snow, were you not, from Basin south on Saturday morning?

A. There might have been a little but not enough to impede travel.

Q. It wasn't frozen?

(Testimony of W. V. Dolezal.)

A. No, sir. The snow might have been frozen because the weather was very cold but the road was not icy.

Mr. Goppert: That is all.

Cross-Examination

By Mr. Lush:

Q. Now, Mr. Dolezal, is this stoppage of the snow and ice you testified to at the Lamb driveway, was that abrupt?

A. More or less abrupt that ice was.

Q. More or less abrupt? [337]

A. Just about opposite the trees.

Q. This map is made to scale?

A. Yes, sir.

Q. And it is 250 feet from the center of the drainage ditch, or the irrigation ditch, to the center of the Martin Lamb driveway. Now if we move up to the upper half and each one of these represents a half inch, and this should be a foot, we find this irrigation lateral is 425 feet north of the scene of the accident, plus or minus a few feet, and that the road tapers down somewhat from that. Now there is a space between those two of about 175 feet; would it have been possible for an individual to have walked from the Martin Lamb driveway up to that irrigation lateral at the time of that accident and not noticed the difference between those conditions?

A. I would assume that one walking would notice those conditions.

Q. And if many people walked up there and

(Testimony of W. V. Dolezal.)

testified that the conditions were the same not only so far as the irrigation lateral but as far as you could see north, do you think then you might be mistaken about your testimony?

A. I don't believe so.

Mr. Lush: That is all. [338]

Redirect Examination

By Mr. Goppert:

Q. You do know that there was a distinct good road and then you came on the bad road at approximately that tree location there west of the Lamb place?

A. That is my recollection.

Mr. Goppert: That is all.

Mr. Goppert: The next witness will be longer, if the court please.

The Court: We will suspend here and take a recess until two o'clock this afternoon. (12:00 noon.)

(Court resumed at 2:00 o'clock p.m. on May 18, 1949, at which time all counsel and plaintiff were present.)

The Court: Proceed, gentlemen.

Mr. Goppert: Mr. Clinton.

ARTHUR CLINTON

was called as a witness for defendant, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Haughey:

Q. Will you state your name, please?

A. Arthur Clinton.

Q. Where do you live?

A. Mills, Wyoming. [339]

Q. What is your occupation?

A. Shop foreman.

Q. Are you employed at the present time?

A. No, sir.

Q. What was your last employment?

A. Fred Manning, Inc.

Q. How recently did you leave that employment?

A. One week.

Q. How long had you worked for Fred Manning, Inc.?

A. Approximately 4½ years.

Q. Were you during that period employed, during all the period employed as shop foreman?

A. No, sir.

Q. And what did you do when you first came with the company?

A. I was a mechanic.

Q. When were you promoted to shop foreman?

A. Just about three years ago.

Q. That would be in the spring of 1946?

A. Yes.

Q. Where were you working, Mr. Clinton, in the year 1946 after your promotion to shop foreman?

(Testimony of Arthur Clinton.)

A. Fred Manning Garage in Mills, Wyoming.

Q. Where is Mills, please?

A. It is right on the outskirts of Casper.

Q. Were you familiar with the purchase by the company of a West Coast Special Tractor?

A. Yes, sir.

Q. When was that—I should ask the date—was that West Coast Special involved in an accident near Worland on December 27, 1946?

A. Yes, sir. [340]

Q. Was that the only unit of the kind the company had at the time of the accident?

A. At the present time, yes.

Q. Pardon?

A. At the time of the accident, yes.

Q. When was the unit purchased?

A. I don't know the exact date. It was a new truck at the time of the accident, very few miles on it.

Q. Had it been purchased within the preceding month? A. Yes.

Q. Did the company also acquire a trailer to use with that tractor? A. A new one.

Q. Pardon. A. I didn't quite understand.

Q. Did the company also purchase a trailer to go along with that tractor unit, the West Coast Special?

A. They had ordered a trailer, yes.

Q. And was the unit, or rather were the two units, the tractor and the trailer put together in the company's shop at Mills? A. Yes, sir.

(Testimony of Arthur Clinton.)

Q. What kind of trailer was the rear unit, just a trailer or semi?

A. The one involved in the accident?

Q. Yes.

A. It was a semi trailer. I think it was a Spencer trailer.

Q. Did you have supervision of the shop work in the [341] garage in Mills? A. Yes, sir.

Q. Was the tractor and the semi-trailer inspected at the time shortly after it was acquired and purchased in the shop? A. Yes, sir.

Q. And what did that inspection consist of, Mr. Clinton?

A. We built the truck up there completely for oilfield work. We checked all lights and brakes. It had new tires on, and naturally fire extinguisher, first aid kits; it was complete.

Q. When you say you built it up what do you mean by that?

A. We installed a winch, fifth wheel.

Q. What is the fifth wheel?

A. That is a table that the trailer sets on and it is connected to the truck.

Q. Go ahead and explain any further assembly work you did there?

A. We put all the air hoses on, clearance lights, and fixed it up to go in the field and work.

Q. What kind of brakes were the tractor and the trailer equipped with? A. Airbrakes.

Q. What manufacturer made them, do you know? A. Bendix, Westinghouse.

(Testimony of Arthur Clinton.)

Q. Now handing you what has been marked as Defendant's Exhibit No. 15, which happens to be page 22 of an [342] International Harvester booklet concerning Model W 4064 L, I will ask you whether the diagram at the top of the page is a fair indication of a side view of that West Coast Special truck? Now before you answer I might add that I don't want you to say with respect to specific length of the different parts but if as a general over-all picture does that fairly represent the West Coast Special unit as it was when you purchased it?

A. Yes, sir.

Q. And I wonder if you would draw on the diagram the winch showing its position on the truck together with whatever other equipment you can recall was installed by your shop there at Mills?

A. You want a diagram of the winch?

Q. Yes, just a side view of the equipment that was installed on the truck?

A. Right in here would be approximately the center of the winch.

Q. Now the winch is the circle you have drawn right through the dotted line marked "CA"?

A. This winch sets on an inch and a quarter what we call a bed plate extending up this way, a post.

Q. That post is right to the immediate rear of the back of the cab?

A. Yes, sir. There is also a short post here, and bars go up there.

(Testimony of Arthur Clinton.)

Q. These are back of the winch? Is it the short post [343] you refer to?

A. The short post is behind the winch.

Q. And then you make a diagonal line from the top of that short post to the longer post, what does that indicate?

A. That is a brace in case your truck tips over or anything it don't bend it up. These posts are made out of 3½ inch heavy pipe.

Q. Now there was some testimony about a possum belly, possum box, draw its position on the truck?

A. This possum belly as they call it is right behind the winch and sets right in between the frame, and that is where they carry the chains and any little stuff that you might have.

Q. Now can you show on that diagram the air hose lines, that is, lines from here to the trailer?

A. Well your pipe air lines come back along the frame.

Q. Inside the frame?

A. And we connect on to them. We have to run some new pipe in there, of course, from your foot pedal and from your hand control valve and go right up this post with pipe.

Q. Right up the post immediately to the rear of the cab?

A. Yes, sir, and there is another brace here.

Q. Above the winch?

A. Yes, and on this brace there's two gladhands, post connections. [344]

(Testimony of Arthur Clinton.)

Q. Is that a connection from the pipe to a hose?

A. Yes, sir.

Q. Can you describe what that gladhand is?

A. It is a quick coupling air line connector.

Q. And then to the rear of the gladhand—pardon me—is that gladhand similar to the connection for the air lines on pullman cars used by the pullman cars?

A. Yes, sir.

Q. And then where do the hoses run from that gladhand which is above the winch?

A. They run from there back to the front of the trailer. There's also some gladhands on the front of the trailer.

Q. So that the hose between the truck and the trailer can be disconnected at either the trailer end or truck end near the winch?

A. Yes, sir.

Q. What kind of hose is the air hose?

A. It is high pressure Bendix-Westinghouse air hose.

Q. Will you re-draw that line showing the air hose a little distincter please and then mark air hose along side it?

Mr. Haughey: We offer in evidence Defendant's Exhibit No. 15.

The Court: Have you shown this to counsel?

Mr. Haughey: I thought he saw me draw it.

Q. Are there one or two hoses leading from the gladhands in front to the gladhands in back?

A. Two. [345]

Mr. Lush: It is understood this is not dimensionally correct?

(Testimony of Arthur Clinton.)

Mr. Goppert: That is right.

Mr. Lush: No objection.

The Court: It may be received.

(Whereupon said Defendant's Exhibit No. 15, offered and received in evidence, is part of this record.)

Q. (By Mr. Haughey): When was that truck and trailer unit, when was the assembly completed and the truck sent out on the road?

A. Approximately one week before it was sent out on the road.

Q. Had you examined it yourself to make sure that it was or was not in satisfactory condition?

A. Yes, sir.

Q. And what can you say with respect to the condition of the vehicle, the truck and trailer at that time?

A. It was in good condition.

Q. Specifically with respect to the brakes?

A. Yes, sir.

Q. Did you have occasion to travel on U. S. Highway No. 20 between Basin and Worland, Wyoming, on the day that the accident occurred, the accident on December 27th, 1946?

A. Yes, sir.

Q. And what was the occasion for your traveling down [346] that road that day?

A. I was going from Powell, Wyoming, to Casper.

Q. What time of day did you leave Powell?

A. Approximately four-thirty in the morning.

(Testimony of Arthur Clinton.)

Q. And did you stop to eat along the way anywhere? A. No, sir.

Q. When did you leave Basin, do you have any recollection?

A. I don't recall when I left Basin. I left Lovell at five o'clock.

Q. Can you describe the road conditions between Lovell and Worland, Wyoming, that morning?

A. When we left Lovell it was dry and as we proceeded towards Worland we run into fine mist of rain and it kept getting heavier all the time. We used windshield wipers. The road was wet I believe when we left Basin.

Q. As you proceeded south from Basin to begin with you say the road was wet, did the condition of the road change any between that point and Worland? A. Yes, sir.

Q. And tell what kind of change took place?

A. Well as we proceeded south of Manderson I think you come through some foothills and it was dark and I know we were going down the road and all of a sudden we come on some icy roads.

Q. Could you tell any difference from the appearance [347] of the road before you run on to the icy road? A. No, sir.

Q. Did you have any trouble controlling your vehicle at the time you struck the ice?

A. Yes, it was very slick. We had to slow down and proceeding into Worland there was ice nearly through or about all the way through the Windy River Canyon.

(Testimony of Arthur Clinton.)

Q. Can you locate the place where the change in the highway condition occurred at, that is, where you ran on to the ice?

A. Not exactly. It was somewhere after we left those foothills and started across the little valley towards Worland. It's near where that big flame was burning to the right of the road there headed up towards Worland.

Q. And what was that big flame; do you know what was the cause of it?

A. I believe it was a burning gas well or burning torch.

Q. Was that the Pure Oil well that was on fire in that vicinity at the time?

A. I think it was. I am not familiar with the locations.

Q. Showing you what has been marked as Defendant's Exhibit No. 16, I will ask whether you know or do you know what the source of the smoke is which arises near the center of the picture?

A. I would say that is the burning well.

Q. But you were not acquainted with the particular area there and you couldn't swear whether it was or not I assume? [348]

Q. At any rate when you struck the ice it is your recollection that there was a flame off to the right, is that right?

A. Yes, sir.

Q. Is that west of the highway you are speaking of, the flame?

A. I believe it would be west, yes, sir.

(Testimony of Arthur Clinton.)

Q. What time was it when you got into Worland that morning?

A. I couldn't say for sure, just getting daylight.

Q. Have you ever been employed as a truck driver, Mr. Clinton? A. Yes, sir.

Q. How long experience did you have as truck driver? A. About maybe 15 years.

Q. And during that experience did you drive any heavy tractors of the same type as the West Coast Special?

A. Never have drove a West Coast Special.

Q. Have you driven the equivalent or same approximate size? A. Yes, sir.

Q. Have you driven equipment with dual rear wheels, that is, with dual drive dual axled rear wheels? A. Yes, sir.

Q. And have you driven equipment with semi-trailer attached to such a tractor unit?

A. Yes, sir.

Q. Have you ever operated any equipment of that kind on ice or snow? A. Yes, sir.

Q. Have you specifically operated that kind of equipment on oiled highways in Wyoming over icy roads? A. Yes, sir. [349]

Q. And can you tell us the proper way to reduce the speed of a vehicle of that kind and size on an icy road?

Mr. Lush: I object, your Honor; no proper foundation, no identity of conditions established yet.

The Court: Well he hasn't shown similar con-

(Testimony of Arthur Clinton.)

ditions exactly but with the brakes and equipment on the vehicles that he has operated are then like the ones like the West Coast. I think you ought to lay a little further foundation and show the similarity closely to conditions as here. I think you could bring out a better foundation than you have.

Q. (By Mr. Haughey): Are you familiar with the braking equipment of the West Coast Special involved in this accident? A. Yes, sir.

Q. Can you describe how the air brakes were connected and how they were operated?

A. To the truck and trailer.

Q. To both, yes. First to each unit and then to the two together.

A. The brakes are connected to the trailer or the truck through the foot pedal.

Q. The trailer and truck?

A. Yes, they were connected to the trailer and truck operated by the foot pedal. There is also a trailer brake valve on there too to brake your trailer separate.

Q. Where is that valve control?

A. Fastened on to the steering post. [350]

Q. Have you operated truck and semi-trailer combinations equipped with the same type of brakes and brake controls as were on that West Coast Special involved in this accident? A. Yes, sir.

Q. Have you operated such equipment over icy roads? A. Yes, sir.

Q. Have you operated them over the type of slick surface that you encountered north of Wor-

(Testimony of Arthur Clinton.)

land on the morning of the accident? A. Yes.

Q. Will you describe how brakes—will you describe how one should reduce the speed of the vehicle of that kind on a very slick icy surface with the type of brakes used by the West Coast Special?

A. You should use your trailer brakes to slow it down.

Q. And if the trailer is unloaded, would that have any effect on the slowing down of the whole vehicle? A. Yes.

Q. In what way?

A. You would have no weight there to make traction. You wouldn't slow down so quick.

Q. If that did not slow you down adequately, would it be proper then to do any other operation, any other braking operation?

A. You could what they call fan the truck brakes as long as you don't lock your truck wheels.

Q. Now if you fan the truck brakes with that kind of [351] unit, you mean you can apply the truck brake only or truck and trailer brakes together?

A. That would apply the truck and trailer brakes together.

Q. And what about power braking, would that be proper or not? A. That would be proper.

Q. Can you tell us what truckers mean generally when they use the term power braking?

A. They keep the truck in motion by stepping on the throttle using the power on it so none of the wheels would lock.

Q. And at the same time operating a brake?

(Testimony of Arthur Clinton.)

A. Yes.

Q. The foot brake? A. Yes.

Q. Would he in that particular braking operation, would he fan the foot brake or hold it steady?

A. I would say he should fan the foot brake.

Q. By that you mean intermittent application of the foot brake? A. Yes.

Q. Mr. Clinton, did you connect up the brakes, that is, the air hose between the truck and trailer yourself on that West Coast Special you were describing a while ago?

A. It was done in our shop at Mills.

Q. Was that under your immediate supervision?

A. Yes, sir.

Mr. Haughey: That is all. [352]

Cross-Examination

By Mr. Lush:

Q. When were those connected up, what date? Do you remember?

A. I couldn't state the exact date, approximately the 20th or 21st.

Q. And any competent truck driver could remove it, could he not? A. Yes.

Q. Now when you were talking about the new tractor the company had purchased and the new trailer it had purchased was this a new trailer that had been purchased by the Manning Company that had been involved in this particular accident?

A. No, sir.

(Testimony of Arthur Clinton.)

Q. So the trailer you were talking about wasn't the trailer involved in this accident at all?

A. No, sir.

Mr. Haughey: My recollection was that the trailer he testified was borrowed.

Mr. Lush: I didn't remember him saying anything about a borrowed trailer; if he did, I missed it.

Q. (By Mr. Lush): Now when you testified you connected the air brakes up on this which trailer were you talking about?

A. On the borrowed trailer.

Q. And this operation was actually performed with a [353] borrowed trailer and a Manning tractor, is that right? A. Yes, sir.

Q. Now if I understood you correctly you said as you came south toward Worland out of Basin you ran into some snow, is that right, or did you run into rain there? A. Rain.

Q. Into a rain. Now that is south of Basin and south of the foothills and coming down the road toward Worland, is that right? A. Yes.

Q. And that was about sometime between five o'clock in the morning and sun up?

A. Yes, sir.

Q. And there was no snow on the road from Basin to Worland at all at that time?

A. No, sir.

Q. The road was clear blacktop as far as you could tell? A. Yes, sir.

Q. And where did you run into the snow or did you run into the snow?

(Testimony of Arthur Clinton.)

A. I think we run into the snow in the vicinity of Powder River.

Q. Where is Powder River from Worland?

A. That is approximately 100 miles towards Casper.

Q. 100 miles towards Casper. Now you are not sure just where you ran into that sleeting mist on that morning?

A. No, sir.

Q. And do you remember how far that sleeting mist went [354] south from Worland?

A. I would say it was 10 or 11 miles.

Q. And was that sleeting mist freezing on the highway when you came upon it?

A. Yes, sir.

Q. In other words, was the temperature outside cold enough to freeze this on the highway?

A. It was in that valley.

Q. Do you have any recollection at all what the temperature was that morning?

A. No, I don't.

Q. And you were away south of there that afternoon, I suppose?

A. I was in Casper.

Q. But it was cold enough at the time that you came over there for this mist to freeze on to the roadway?

A. Yes.

Q. Well if that mist continued on northward do you have any reason to suppose it was warmer northward?

A. It was very warm in Lovell.

Q. And you came into misty rain out of Lovell too, didn't you?

A. Yes.

Q. And that continued on down to near Basin?

(Testimony of Arthur Clinton.)

A. It continued about half way through the Windy River Canyon.

Q. Half way through the Windy River Canyon?

A. Yes.

Q. Where is the Windy River Canyon?

A. South of Thermopolis. [355]

Q. Then it was raining the whole way from Lovell down to the Windy River Canyon?

A. Yes, sir.

Q. Do I understand your testimony correctly that you were driving through rain all the time from the time you left Lovell until you were down south of Thermopolis?

A. Well it might let up at spells.

Q. But generally the condition was raining?

A. It hadn't turned to snow yet.

Q. Now you testified you have driven a tractor and trailer under conditions very much identical with these shown here? A. Yes.

Q. And the size of the West Coast Special?

A. Yes.

Q. And you have driven them on icy roads?

A. Yes, sir.

Q. Did you ever come upon those icy roads unexpectedly? A. Yes.

Q. Did you lose control of your vehicle when you did it? A. No, I don't believe I have.

Q. Now you testified that under those circumstances you would use your trailer brakes to slow the rig down, is that right? A. Yes, sir.

Q. You would apply those first?

(Testimony of Arthur Clinton.)

A. Yes, sir.

Q. And then you would apply your tractor brakes, your combined brakes of the tractor and trailer brakes on the foot pedal if your vehicle did not slow down rapidly enough, [356] is that correct? A. Yes.

Q. And you would fan those brakes?

A. Yes, sir.

Q. Would you keep your tractor or trailer brakes on when you were doing that?

A. Your trailer brakes work in connection with your truck brakes.

Q. Didn't you say first you would set your trailer brakes? A. Yes.

Q. And having set your trailer brakes you would fan your tractor trailer brakes? A. Yes.

Q. Would you release the trailer brakes first? A. Yes.

Q. Now on ice would you fan the brakes or pump them as we laymen say?

A. In order to be sure and not lock the tractor wheels.

Q. And if you lock the tractor wheels, what would happen? A. Very liable to skid.

Q. And if you did start to skid, how would you get it out of the skid?

A. You would have to apply power.

Q. Would you have to release the brakes also?

A. No, you could keep fanning them if you want to.

(Testimony of Arthur Clinton.)

Q. You could keep fanning them but if you did keep fanning them, you must apply power?

A. Yes.

Q. And regardless what you did about brakes you would not come out of the skid until you did apply power? [357]

Q. What is the difference? Will you explain it is us?

A. Well you might be able to straighten the truck up without applying power if you have enough forward momentum.

Q. You would turn your wheel in the direction of the skid, would you, in your attempt to do that?

A. Yes, sir.

Mr. Lush: That is all.

Redirect Examination

By Mr. Haughey:

Q. When you first came into the area which Mr. Lush describes as rain, is that the area where you said you first encountered mist?

A. I believe it was misty most all the way; it wasn't as bad in some places as others.

Q. And do you remember where the rain itself started?

A. I believe it was around Basin or Manderson.

Q. And did that change later to sleet or not?

A. No, it started freezing on the windshield.

Q. Can you describe where the freezing on the windshield took place with reference to the place you first came on to the ice?

(Testimony of Arthur Clinton.)

A. It was right after we started across the valley toward Worland, after approximately six or seven miles after [358] you leave Manderson.

Q. With reference to the town of Worland where did you come on to that ice, would you tell us?

A. I would say it was 10 or 11 miles north of Worland.

Mr. Haughey: That is all.

The Court: Anything further?

Mr. Lush: I am through, your Honor.

Mr. Goppert: We will call a witness out of order. [359]

* * *

Mr. Goppert: We will offer in evidence at this time Defendant's Exhibit No. 16.

Mr. Lush: No objection.

The Court: It may be received in evidence.

Whereupon said Defendant's Exhibit No. 16, being a photograph showing smoke, offered and received in evidence, is a part of this record.

A. J. PROSSER

was called as a witness for defendant, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Goppert:

Q. State your name. A. A. J. Prosser.

Q. Where do you reside?

A. Casper, Wyoming.

(Testimony of A. J. Prosser.)

Q. How long have you resided at Casper, Wyoming?

A. About four years and a half.

Q. Were you employed by the Fred M. Manning, Inc., in December of 1947? A. Yes.

Q. Beg your pardon—1946. I wanted to know for 1946? [360] A. Yes.

Q. And are you employed by that company at this time? A. No, sir.

Q. Who are you now employed by?

A. General Petroleum Corporation.

Q. How long since you were working for the Manning Company?

A. December 22nd, I believe.

Q. Of 1948? A. 1947.

Q. What was the nature of your employment in December of 1946 with the Manning Company?

A. Superintendent of Transportation.

Q. Did you have charge of the operation of the Manning trucks and motor vehicles at that time?

A. Yes, sir.

Q. And were you the one that did the hiring and firing of the truck drivers? A. Yes, sir.

Q. Did you have occasion while acting as Superintendent of Transportation for this company to employ one Robert B. Hawkins?

A. No, sir, I think he went to work a few days before I was in charge of the transportation. I believe Bob King hired him.

Q. How long have you known Mr. Hawkins?

(Testimony of A. J. Prosser.)

A. Well I believe about approximately fifteen years.

Q. Have you been acquainted with his operations as a truck driver during that period of time? [361]

A. Not all that period of time but about 1923 up through 1926 I knew quite a bit about Mr. Hawkins.

Q. 1923 to 1926? A. Yes, sir.

Q. What was your knowledge of him as to whether or not he was a good or a poor truck driver?

Mr. Lush: Objected to, your Honor. It is a conclusion of the witness as to his opinion as to the ability of another man to drive truck without a word of evidence he ever saw him drive a truck.

The Court: Yes, I think so.

Q. (By Mr. Goppert): Have you observed him driving truck during any of that period of time?

A. Yes.

Q. How many years?

A. Before my being on transportation with Manning I was in charge of rigging up and tearing down, which was titled Rigup and Teardown Supervisor.

Q. You mean rigging up and tearing down drilling rigs? A. Yes, sir.

Q. And as such did you get acquainted with various operations that the truck driver performed?

A. Mr. Hawkins was driving at that time for Manning.

Q. And have you had occasion to observe his manner of operation of vehicles, do you know—and

(Testimony of A. J. Prosser.)

particularly trucks do you know whether or not he was competent and capable?

A. Yes. [362]

Q. And what was that situation?

Mr. Lush: I object, your Honor. I don't believe that one person can testify to another's capacity to drive a vehicle.

The Court: Well I will let him answer the question. It is only about his constant or continued observation for three years driving various trucks, was it? A. Yes, sir.

The Court: What was it? What do you say about it?

A. Well at the time I worked for Manning while I was Rigup and Teardown Supervisor I seen him move a considerable amount of heavy iron in the field and over the road without any accidents, and he is very careful of a truck, takes good care of a truck. I would say that would be my version of it.

Q. (By Mr. Goppert): Were you the one who picked him to take charge of the West Coast Special that was involved in the accident in December, 1947?

A. Yes, sir.

Q. And was that in the nature of a promotion to get that opportunity?

Mr. Lush: I object to the materiality of this, your Honor.

The Court: Well I don't know. What do you mean by that promotion?

Q. As between the drivers of the Manning Company did you [363] select him as being the one to trust this equipment with?

(Testimony of A. J. Prosser.)

The Court: Well you considered it a position of considerable responsibility and required skill and dependability and all that, did you?

A. That was my idea of giving it to him.

The Court: You employed him because of your knowledge of his experience as a driver?

A. Yes, and ownership of trucks.

The Court: Well I think that is probably what you want to develop, isn't it?

Mr. Goppert: That is right.

Q. (By Mr. Goppert): And you picked him out of all the Manning truck drivers to take this new equipment on the job, did you not?

A. That is right.

Q. And it was a desirable job for any of the drivers, wasn't it?

A. That is right.

Q. And had you had occasion to inspect this equipment as it was assembled at the garage of the Manning Company at Mills, Wyoming, in 1947?

A. Yes, not all of it. All the time I had eighteen pieces of equipment running, the majority of it. I was with it sometime during its operation.

Q. Well you had occasion to see this equipment before it went out on the job, did you not? [364]

A. Yes, sir. I borrowed the trailer from Pittman.

Q. You were the one that arranged for the trailer to equip it, were you not?

A. That is right.

Q. And was it properly equipped with brakes?

(Testimony of A. J. Prosser.)

A. It had Westinghouse Airbrakes on it, yes.

Q. And did those brakes consist of airbrake that was manually controlled from a lever on the front steering wheel to the trailer, and was there a foot brake pedal brake that controlled the air on the entire unit, that is, the tractor and trailer together?

A. Yes, the hand valve was separate from the foot valve on the trailer alone and the foot valve and the trailer was connected together.

Q. And did you observe how the connections were made for the air between the truck and the trailer? A. Yes, sir.

Q. Before it went out on this trip?

A. Yes, sir.

Q. And what was that connection?

A. Well there was a twelve foot piece of hose, I believe. I might be wrong in inches, but it was at least twelve foot and it had gladhand on each end. The truck had gladhands on it and the trailer had gladhands on it and attached it together when the trailer was intact.

Q. What kind of hose?

A. Special airhose; I think two ply hose.

Q. Was it regular equipment for that kind of job? [365] A. Yes.

Q. Would it stand the pressure of those airbrakes? A. Yes.

Q. And those gladhands you mentioned, are those similar to the connections between passenger cars, pullman cars on the air?

(Testimony of A. J. Prosser.)

A. They are practically the same. They are made light and a little different. That is what they are called.

Q. Are they standard equipment on these semi-trailer units?

A. Practically all semi-trailers have them as standard equipment.

Q. And did you have occasion to observe this equipment following the accident?

A. I observed it about ten o'clock the night of the accident.

Q. Where were you when you first received word of the accident? A. Casper.

Q. Had you been in Casper all that day?

A. I couldn't answer you that now. I don't know.

Q. What time of the day did you leave Casper?

A. I left there in the neighborhood of ten or fifteen minutes after four; as soon as I knew there was a wreck.

Q. To go to Worland. A. Yes.

Q. When you got to Worland did you go immediately to [366] the scene of the accident?

A. No, I went to the hospital.

Q. To see the truck driver, Mr. Hawkins?

A. That is right.

Q. And you found him there? A. Yes.

Q. And when did you go to the scene of the accident?

A. I don't know for sure, sometime during ten o'clock that night.

(Testimony of A. J. Prosser.)

Q. Was the Manning truck and trailer there?

A. It was on the barrow pit on the west side of the road. It had been pulled off the road. When I got there the road was clear.

Q. You say on the west side of the road?

A. East side.

Q. Did you make any inspection to see or observe whether or not there was any part of the connection for the airhose there?

A. Yes, sir, I did.

Q. What did you find?

A. Well I found the hose completely burned up but all the gladhands were intact.

Q. They were still connected at that time?

A. They were still connected but the hoses were burned in two.

Q. Was there any remaining stubs, pieces of the hose remaining on any of these four [367] gladhands? A. Not that I saw, no.

Q. Did you have anything to do with the removal of the Manning equipment from the scene of the accident afterwards?

A. Personally I didn't move anything myself. I went back myself and picked up the chains, jacks, lock rings and flares and whatever other things I could find and sent two trucks to haul it in after I got a release from the insurance company.

Q. Did the front tires of the tractor portion of this unit burn?

A. Not to blow out or anything. They burned a little but they didn't blow.

(Testimony of A. J. Prosser.)

Q. That is, they were scorched but weren't consumed by the fire?

A. They weren't useable afterwards. They got soft on one side, I believe next to the bus.

Q. From what you saw that was burned up on that truck where were these hoses, that is, air hose connections with reference to the portion of the vehicle that did burn?

A. Well the ones on the tractor are fastened just above the winch on the lefthand side of the tractor and on the trailer one on past center on each side.

Q. Was that portion of the trailer immediately in the area where these gladhands connected on to the trailer, was [368] that burned?

A. It burned the floor out of the trailer for about two feet back right where the gladhands were attached on to.

Q. That is behind the gladhands and had it burned up on the tractor on the left side?

A. It was a complete loss the tractor was.

Q. Isn't it a fact that the gas tank is right down under where those hose connections were, that is, the lefthand gas tank?

A. I would say the lefthand gas tank was possibly two feet from where the hose, maybe three feet from where the gladhands come off the tractor, and the other end of it probably the same distance from the end of the tractor.

Q. That fire burned up the eight rear tires of that big truck, did it not?

(Testimony of A. J. Prosser.)

A. Yes, and one spare tire that was laying on the trailer.

Q. That was laying on the front end of the trailer, was it? A. Yes.

Q. Was this truck equipped with any device for controlling its speed?

A. Yes, it has a governor on it but I believe the boys told me they had taken it back after I inspected the job.

Q. You couldn't tell what it was set at when you last saw it?

A. We hadn't never had it out of the yard to see what [369] it was set at top speed. They took it back and set it at 45 miles an hour.

Q. That is what they were to set it at?

A. That is what they were to set it at.

Q. Did you inspect it to see if that was done?

A. No, I wasn't there at the time. It left before I got back and I hadn't seen it any more.

Q. Did you have occasion to observe the condition of the highway from Worland to the scene of the accident? A. Yes, sir.

Q. And as I understand it that was sometime approximately ten o'clock that night?

A. Approximately ten o'clock.

Q. And what was that condition?

A. It was rough and awful slick.

Q. Did you observe the condition as you went north from the scene of the accident?

A. I never went north.

Q. You didn't look down that way either?

(Testimony of A. J. Prosser.)

A. It was dark. I just turned around in that driveway there west from where the bus set on the east side and turned my lights over toward the tractor and got out in the road there.

Q. You are acquainted with the possum belly on these semis? A. Yes.

Q. And as I understand it that is an iron box that is made between the two sides of the frame and a couple of [370] cross pieces that form the trailer body, or form the tractor body?

A. That is right.

Q. And did you have occasion to observe if there was any hose in that after this fire?

A. There was no hose in it because I had taken everything out of it, taken the chains and things.

Q. You found no hose there? A. No hose.

Q. If there had been hose there, would it have burned?

A. I would have thought it would as long as the chains weren't any good.

Q. Had the temper been taken out of the chains?

A. Yes.

Q. By the heat of that fire?

A. This possum belly is drilled full of holes in the bottom and it just acts as a furnace coming up through there with the air from the bottom with the gasoline spraying.

Q. Have you had experience as a truck driver?

A. Yes.

Q. Are you acquainted with the proper method

(Testimony of A. J. Prosser.)

of stopping a vehicle of this type that is involved in this accident on ice?

A. I would think I would be, yes.

Q. How many years experience?

A. Well in the neighborhood of twenty-five.

Q. And as such during that time have you had occasion to stop vehicles of this size and type on ice? A. Yes, I believe I have. [371]

Q. And what would you say is the proper method of handling that vehicle when you got off of a good road on to ice?

A. I would say brake it from the trailer. If you can't do it that way, why power brake it and through tractor and trailer fanning the brakes.

Q. And that is the proper method, if you want to do it that way it could be done?

A. Well unless you can slide it into gravel or something else.

Mr. Goppert: You may inquire.

Cross-Examination

By Mr. Lush:

Q. Now, Mr. Prosser, when you step down on the brakes under the conditions described hard enough to cause the trailer to skid or the tractor to skid, how would you go about getting the tractor out of the skid?

A. Well I would turn it toward the skid and apply power to it.

Q. Turn it into the skid and apply power?

A. If I got into the skid.

(Testimony of A. J. Prosser.)

Q. If you braked it hard enough to put it into a skid, have you braked it too hard?

A. I don't believe I quite understand you. [372]

Q. In other words, the proper method of braking under those circumstances would not throw you into a skid?

A. Well I wouldn't say that. It could be rough conditions of the road will cause you to skid the same as your braking.

Q. And if you put your brakes on and started to skid, you would immediately release the brakes?

A. That is what I would do.

Q. And then apply power? A. Yes.

Q. And if you do that, what happens?

A. Well it will pull itself out.

Q. Now you say you would also slide yourself in gravel if you could. A. That is right.

Q. Under the circumstances where would you ordinarily find that gravel?

A. Right at the edge of the road.

Q. On the shoulders?

A. On the shoulders.

Q. And if there was a vehicle approaching from the opposite direction, you would endeavor to make your own shoulder to skid it on?

A. That is where we always try.

Q. Now you testified that there was an extremely hot fire in that possum belly?

A. That is right.

Q. And the action of the fire will reduce those air hoses to ashes?

(Testimony of A. J. Prosser.)

A. That is my belief anyway, two ply rubber hoses.

Q. And there were hoses in the bottom of the possum belly? [373]

A. No, there's no hoses in the bottom of the possum belly; they were hanging down over the possum belly.

Q. Were there ashes in the possum belly?

A. I didn't see.

Q. You picked chains out?

A. There was dirt and everything else.

Q. You wouldn't swear now there were not in the ashes hoses in there? A. No, sir.

Mr. Lush: That is all.

Redirect Examination

By Mr. Goppert:

Q. In your experience as a truck driver would you say that a truck will skid from other causes than braking? A. Yes, sir.

Q. And you mentioned rough roads, and did you say gravel?

A. No, I said that would be the way I would stop it.

Q. But if you had some gravel on one side and not on the other, might it cause a skid?

A. It is possible.

Q. And when you say a rough spot will cause it, you mean a place where there is a low spot and then a high spot? A. Yes, very apt to.

(Testimony of A. J. Prosser.)

Q. Or just a little bump?

A. Well it would take a pretty good size bump with a [374] truck as big as that was.

Mr. Goppert: That is all.

Mr. Lush: That is all.

Mr. Haughey: May I recall Mr. Clinton for one more question?

The Court: Very well.

ARTHUR CLINTON

resumed the stand and testified as follows:

Redirect Examination

(Continued)

By Mr. Haughey:

Q. Did the West Coast Special involved in this accident have a governor of any kind on it?

A. Yes, sir.

Q. At what speed was that set to, or rather how fast was that truck able to go with the governor set as it was?

A. As close as we could get it to 45 miles an hour.

Q. That is on level road? A. Yes.

Q. Did you test it yourself? A. Yes.

Q. Did you try the truck to see how fast it would go? A. Yes.

Q. What was the maximum speed?

A. It hanged right at 45 miles an hour, between 42, 45, possibly 46.

Mr. Haughey: That is all. [375]

(Testimony of Arthur Clinton.)

Recross-Examination

By Mr. Lush:

Q. What was the nature of the governor you had on there, did it cut off air, reduce amount of gas or how was it governed?

A. It is connected on to the carburetor. I believe it is vacuum operated, the governor, and cut your air off into your carburetor.

Q. It cuts the air off to the carburetor?

A. Yes.

Q. And you never examined that after the accident, did you? A. No, sir.

Mr. Lush: That is all.

The Court: We will take a recess. (3:00 p.m.)

(Court resumed at 3:25 p.m., at which time all counsel and plaintiff were present.)

Mr. Goppert: If the court please, I want to recall Mr. Prosser for a question or two.

The Court: Very well.

A. J. PROSSER

resumed the stand and testified as follows:

Redirect Examination

(Continued)

By Mr. Goppert:

Q. You were acquainted with the hand lever controls in [376] the cab of this West Coast Special, were you not, as it was equipped before going out on this trip? A. Yes.

(Testimony of A. J. Prosser.)

Q. And will you state the number and locate each of those controls, those hand lever controls that were in the front cab?

A. Do you want all the winch controls, the winch brake, the shifting levers and everything that was in the cab?

Q. No, not all the controls. I mean the hand lever controls. I think there has been evidence of three hand lever controls or four in the cab?

A. Well there is one hand lever control, the air valve control, which is on the steering post on the right-hand side. Then it has a parking brake, emergency brake as some people call it, and then there is a lever down between the driver's seat, you have to reach down by that and pull it up.

Q. Describe that lever? Is that a horizontal lever or vertical lever?

A. It is a horizontal lever and hangs from the back part of your seat and extends to the front part of the seat and you have to pull it up to apply it.

Q. You would have to raise that to apply the emergency brake on the tractor, is that it?

A. Yes.

Q. Go ahead.

A. And then it has a shifting lever as all trucks do in the floor board. It has three levers mounted over to the right [377] of your leg just beyond the shifting lever.

Q. That shifting lever is the lever that shifts from one speed to the next? Go ahead and tell us about those other three.

(Testimony of A. J. Prosser.)

A. It also has three levers, one that operates the winch, one by the clutch, one chuck brake and one is outside brake.

Q. And will you name them in the order from the driver's right, towards the right of the cab?

A. Well, I might not be able to do that. I never drove them enough to know. I think I could tell you how they are attached. The one next to the driver was the clutch, the next one to that is what we call the chuck brake.

Q. Does that brake have anything to do with the, either the wheels of the tractor or trailer?

A. No, sir.

Q. Do any of these three levers you are talking about have anything to do with either the brakes of the tractor or trailer? A. No, sir.

Q. Then if one of those was found pulled back, that would have nothing to do with the braking or running gears on that of that equipment?

A. No, sir. They might be in any position while operating the truck down the highway.

Q. They then could all three be back and it wouldn't affect the brakes of the vehicle?

A. That is right.

Mr. Goppert: That is all. [378]

Recross-Examination

By Mr. Lush:

Q. Just a minute, Mr. Prosser. This Pittman trailer you attached on to the tractor, do you know whether or not the brakes had been recently re-

(Testimony of A. J. Prosser.)

lined on that Pittman trailer? A. No, sir.

Mr. Lush: That is all.

Redirect Examination

By Mr. Goppert:

Q. Were those brakes in good working order when you tested them? A. Yes, sir.

Mr. Goppert: That is all.

ROBERT B. HAWKINS

was called as a witness for defendant, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Goppert:

Q. State your name.

A. Robert Hawkins.

Q. Your middle initial? A. B.

Q. And where do you reside at this time? [379]

A. Kenworth, Washington.

Q. And what is your employment at Kenworth, Washington? A. Transportation foreman.

Q. For what concern?

A. Atchison-Jones Construction Company for the Atomic Energy Commission.

Q. How long have you been so employed?

A. 22 months.

Q. What is your official job there in that trucking operation?

A. Mostly moving and setting heavy machinery.

(Testimony of Robert B. Hawkins.)

Q. I mean are you a truck driver or a foreman?

A. I am a foreman.

Q. How long have you held the position as foreman there? A. About 20 months.

Q. Did you start there as a truck driver?

A. Yes, sir.

Q. And how many trucks under your control there? A. I have about 25.

Q. Are they heavy trucks for hauling?

A. Yes, sir, they are.

Q. What size?

A. Well, there are a lot of them known as low boys or prime movers. They use them for moving heavy equipment. They will run from 40 to 50 ton capacity.

Q. Are they as big as this West Coast [380] Special? A. Yes, sir, they are.

Q. Bigger?

A. They may have some bigger. I don't have any bigger than that.

Q. Prior to going out to this job at Kenworth, where were you employed?

A. The last employment I had was with Manning Drilling Company.

Q. Fred M. Manning, Inc.? A. Yes, sir.

Q. And how long had you been engaged as a trucker or truck driver in your lifetime?

A. Well over a period of approximately 25 years.

Q. And are you a married family man?

A. Yes, sir.

(Testimony of Robert B. Hawkins.)

Q. What does your family consist of?

A. Wife, two daughters and a son.

Q. And how long were you employed by the Manning Company prior to the accident of December 27th, 1946?

A. I went to work for the Manning Company the first day of February, 1946.

Q. Had you had experience prior to that time driving large semi-trailers? A. Yes, sir.

Q. Was that always as an employee?

A. No, sir.

Q. Have you owned and operated your own outfit? A. Yes, sir.

Q. What outfit was that and where was it located and [381] during what years?

A. My own business?

Q. Yes.

A. From 1926 to 1931, Gerber, Oklahoma.

Q. Was it oil field hauling? A. Yes, sir.

Q. Was this 25 years of your experience outside of your work on the Atomic Energy Project at Pasco, the oil field hauling? A. Yes, sir.

Q. Had you ever been so unfortunate as to be involved in an accident prior to this one?

A. No, sir.

Q. Had you driven trucks of similar kind?

A. Yes, sir.

Q. Before starting out on the trip—as I understand it started at Casper, is that right?

A. That is right.

(Testimony of Robert B. Hawkins.)

Q. And had you tested this vehicle, this truck and trailer? A. Yes, sir.

Q. And had you checked it as to its brakes?

A. Yes, sir.

Q. And as to its handling? A. Yes, sir.

Q. Did you find it to be in reasonable satisfactory or really satisfactory condition?

A. Yes, sir.

Q. Will you state to the court something about the equipment of that vehicle before starting on that trip? Probably we can save considerable time if I ask you a few questions. Was it equipped with a winch? A. Yes, sir. [382]

Q. And what they call a headend rig?

A. Yes.

Q. Is that the rig that contains the winch?

A. It is a rig built around the winch.

Q. And at one end of that rig, I mean each rear corner of the front of the bed there is a three-inch, two tubes or pipes? A. Yes.

Q. And goes up as high as the cab or higher?

A. Approximately.

Q. And there's cross bars on that that go from side to side between those two up and down beams, are there not? A. Yes, sir.

Q. And back of that some little distance, say two or three feet, is a sloping tubular three-inch pipe that goes down to another pipe that connects down to the frame, is there not? A. Yes.

Q. And isn't it a fact that that is true on both sides of the vehicle? A. Yes, sir.

(Testimony of Robert B. Hawkins.)

Q. And there are wings in between those two big tubular arrangements? A. Yes.

Q. And there are cross bars that brace that, are there not? A. Yes.

Q. And this winch has a steel cable on it, does it not? A. Yes, sir.

Q. To be used for loading and erecting purposes in oil field work? A. Yes. [383]

Q. And that winch and the power take off to it is controlled by three levers in the cab, are they not? A. Yes, sir.

Q. And then the trailer hitch is on what you call a fifth wheel, isn't it? A. Yes.

Q. Now will you describe that fifth wheel to the court?

A. As well as I could describe it to the court it is a table.

Q. Is it round or approximately round?

A. Yes, sir. That is built between the dual tandem wheels on top.

Q. In other words, sort of a round table; the middle of it is in the center between those double sets of duals? A. That is right.

Q. And the connecting link between that and the trailer is some kind of pin, is it, that goes down through that table?

A. It is a pin that is attached to the trailer,

Q. Now then the attachment for brakes to the trailer, what is the means of braking on the trailer and the tractor, that is, what is the substance that

(Testimony of Robert B. Hawkins.)

is used in the braking, is it a fluid or liquid, or what? A. You mean the kind of power?

Q. For the braking?

A. Westinghouse air.

Q. Airbrake? A. Yes, sir.

Q. And how is that air controlled so far as the trailer [384] is concerned?

A. It is operated by a hand valve that is mounted on the steering post on the right hand side of the steering post.

Q. And is that the conventional place for the mounting of that trailer brake? A. Yes, sir.

Q. And does it have any other air control either singly or in connection, or brake control either singly or in connection with the tractor?

A. Nothing but air.

Q. And is there some other control other than the hand control?

A. It has a foot pedal, yes, sir.

Q. Does that foot pedal set the air on the trailer alone? A. No, sir.

Q. What wheels does it set the brakes on?

A. When the trailer is attached to the truck the foot pedal controls the brakes on the truck and trailer.

Q. Are the front wheels equipped with brakes that come from this same foot pedal?

A. Yes, sir.

Q. In other words, if you put the air on the tractor with that trailer attached, does it set the

(Testimony of Robert B. Hawkins.)

brake; that is, this foot pedal does it set the brake on each and every wheel on that vehicle?

A. Yes, sir.

Q. And is that done on an equalizing basis; that is, does it hit them all uniformly?

A. Yes, sir.

Q. Is there an equalizer on it? [385]

A. You have full pressure to all the wheels.

Q. And the brake bands are different sizes by widths in order to adjust the pressure evenly?

A. That is right.

Q. Was this tractor equipped with any kind of a device to control the speed? A. Yes.

Q. And what kind of device was that, Mr. Hawkins? A. It was a governor.

Q. And do you know the nature of the governor?

A. I couldn't tell you the working conditions of it. I do know there was a governor on it.

Q. Do you know how fast you could drive it?

A. They told me it was approximately set at 45 miles an hour.

Q. You had experience driving it on this trip?

A. Yes.

Q. What did you find was the maximum?

A. That was the maximum.

Q. Forty-five? A. Yes.

Q. Mr. Hawkins, had you had in your experience as truck driver the experience of getting on ice suddenly prior to this time? A. Yes, I have.

Q. Have you driven on ice?

A. Yes, I have.

(Testimony of Robert B. Hawkins.)

Q. Have you stopped on ice?

A. Yes, I have.

Q. Have you skidded on ice before?

A. Yes, sir.

Q. And have you skidded without putting on any brakes?

A. Yes, you can skid without putting on [386] brakes

Q. And do you know the usual method of applying brakes to stop a vehicle when it got on ice or got into a skid on ice? . A. Yes, sir.

Q. Do you know how to take a truck and trailer out of a skid?

A. I knew how to try to, yes, sir.

Q. And on this final trip you left Casper on what day, if you know?

A. I believe it was the 23rd of December, 1946.

Q. Where did you go to?

A. I went from Casper to Badger Basin, Wyoming.

Q. Now Badger Basin is located, is it not, on the Clark's Fork River near the Montana-Wyoming line?

A. It is approximately northwest of Powell, Wyoming. You go to Sheridan and take the road to Cody and a few miles out there turn to the right and go out through some pastures.

Q. Do you know the well the Manning Company was having to work on at that time?

A. The location?

Q. Yes, what one it was?

(Testimony of Robert B. Hawkins.)

A. I couldn't definitely name—I think I know what it was. I couldn't definitely say. It was just a couple miles from Badger Basin store.

Q. Was it one of the Seaboard wells of the General Petroleum?

A. It runs in my mind that it was General Petroleum. I [387] couldn't say about that.

Q. The road from that there comes to Powell?

A. Yes.

Q. And then there you reach U. S. No. 320, isn't it?

A. I believe it is.

Q. And that connects up with U. S. No. 20 at a place between Cowley and Lovell, is it not?

A. Yes.

Q. You worked on that day and did some hauling around that area and on the 27th day of December, 1946?

A. Yes.

Q. I believe you started back to Casper with the outfit?

A. Yes, sir.

Q. Had you hauled it up with a load?

A. Yes, sir.

Q. Was it loaded with a load en route to the field at Badger Basin?

A. Yes.

Q. And as I understand it it was empty for all the way back from Badger Basin until you got down to the accident?

A. Yes, sir.

Q. Do you recall the approximate time of day that you left Lovell that day?

A. I think it was about 12:30.

Q. Had you had your lunch at Lovell?

A. I stopped at Lovell and ate lunch.

(Testimony of Robert B. Hawkins.)

Q. And what was the first stop you made after leaving Lovell that you recall?

A. The only stop I recall making after leaving Lovell was about a mile north of Basin, [388] Wyoming.

Q. What was the occasion for that stop?

A. As I came down the road there was a Highway Patrolman with a panel pickup parked there making truck inspections.

Q. And what did you do there?

A. I stopped and he inspected the truck and trailer.

Q. Just a minute. When you drove up to that inspection how did you stop, tell me?

A. I drove up and applied all the brakes.

Q. Did you skid all the wheels?

A. Yes, sir.

Q. Trailer and truck and all?

A. Yes, sir.

Q. Was that the requirement or practice of these highway inspectors when you came upon them?

A. Yes, sir, it was. We had been stopped so many times and after we were stopped they always asked us to skid our wheels and try our brakes, and whenever we could see we were going to be stopped by a Highway Patrolman we brought it to a stop with the brakes applied so they could inspect it.

Q. You showed the Highway Patrolman your outfit? A. Yes, sir.

(Testimony of Robert B. Hawkins.)

Q. Then coming down the roadway from where you left the Highway Patrolman you cruised in a general southerly direction, did you not, to the scene of the accident? A. Yes, sir.

Q. And will you tell the court what the condition was of that highway down to the scene of the accident and down to [391] wherever it changed, if at all?

A. The highway was in good condition from the time that I talked to the Patrolman at Basin up to a point just before the scene of the accident.

Q. And was there snow on it?

A. No, no snow.

Q. Over that place that you drove from where you met the Highway Patrolman and had the inspection down to a short distance north of this accident? A. No, sir.

Q. There was no ice? A. No, sir.

Q. Can you locate with reference to any natural objects—withdraw that—did you see a bus coming from the south? A. Yes, sir.

Q. And about what point had you reached when you first observed that bus?

A. As well as I can remember there was some trees on the right hand side of the road, which would be the west side, is about the first recollection that I remember; it might possibly have been two or three blocks from the bus.

Q. Do you remember a rise in the road?

A. Yes, sir.

(Testimony of Robert B. Hawkins.)

Q. Was that in front of you when you first saw the bus?

A. As well as I remember I believe there was apparently around in there.

Q. And did you at that time come to any conclusion as to where you and the bus would meet?

A. Well, from a distance—— [392]

Q. I mean if neither of you changed your speeds?

A. From the distance that we were it looked to me like there was a good possibility of us meeting on this bridge.

Q. And what was the appearance of the bridge as you approached it then from the north?

A. Well, the bridge had a railing on it that set up around three feet and was covered with what apparently looked to me like snow and it looked narrow to me from when I first seen the bus approaching.

Q. Did it look like to you at that time it would be safe to pass that bus on that bridge?

A. No, it didn't.

Q. And did you observe at that time about what speed you were traveling?

A. I imagine I was traveling around 35 miles an hour.

Q. You weren't going your full limit?

A. No, sir.

Q. Did you estimate the bus coming at about the same speed?

(Testimony of Robert B. Hawkins.)

A. Yes, sir, it looked to me like it was probably traveling about the same rate of speed.

Q. It appeared to be on its own side of the roadway, didn't it? A. Yes.

Q. You observed that curve in the road between the two of you at that time? A. Yes.

Q. And did you know at that time that there was ice under that snow that you observed on that bridge from the [393] distance? A. No.

Q. What did you do at that time when you decided if you kept on at the same speed you would meet and pass on the bridge?

A. I tried to stop.

Q. And when you say you tried to stop—I mean what did you do in the way of trying to stop?

A. I applied the brakes to my trailer.

Q. And by what means?

A. With the hand valve.

Q. Was that the one on the right hand side of the front steering wheel? A. Yes, sir.

Q. Did you do it solidly or lightly?

A. No, I tried to check it gradually.

Q. And what happened?

A. Well, it seemed to me like it hit some rough snow or ice on the road and caused the trailer to slew to the east.

Q. And you were rolling forward at that same speed of 35 miles, possibly a little checked at that time? A. Approximately that.

Q. And did you then attempt to use additional

(Testimony of Robert B. Hawkins.)

means of slackening up the speed on that vehicle and equipment that you were driving?

A. When I see I couldn't check it with these trailer brakes and the trailer was going to the east, I naturally turned the truck to the east to try to go with the skid and applied the foot brake. [394]

Q. Now that was the foot brake that applied the air on both the trailer and the tractor?

A. Yes, sir.

Q. And how did you apply that foot brake?

A. By applying it and releasing it.

Q. You mean with your foot?

A. Yes, sir.

Q. Then can you place approximately where you were on that highway when you applied that foot brake with reference to any natural objects along the highway?

A. It seemed to me like it was as well as I remember about where that driveway come out of that farm house.

Q. Which way, on the west side or the east side of the road? A. On the west side.

Q. And then you started your vehicle toward the east as I understand it, your left, to follow the trailer? A. That is right.

Q. And do you know what fanning brakes is?

A. Well, that is what I would call applying and releasing brakes, touching it on and off.

Q. Was that what you were doing?

A. Yes, sir.

(Testimony of Robert B. Hawkins.)

Q. And did you continue to do that until the vehicle got over to the east side of the highway?

A. Yes, sir.

Q. Did you observe how far to the east side of the highway the equipment went?

A. As well as I remember, it went pretty well to the east side of the highway. [395]

Q. Then what happened?

A. It seemed like it was straightened up, and when it seemed like that the truck had gotten pretty well in front of the trailer I tried to pull it out with power by applying my foot to the brake and giving it some gas to make it pull itself.

Q. And was that the last effort you made just before the collision?

A. About the last. It was coming out of it pretty well and started across the road to the right side.

Q. Was the bus coming toward you at the same time?

A. Yes, it was.

Q. You could see a collision was imminent, could you not?

A. Yes, sir.

Q. And about how fast was your vehicle going at the time of the final impact, if you have any idea?

A. I couldn't definitely state how fast it was going but it must have been down to at least ten miles an hour.

Q. You had actually slackened it considerable, had you not?

A. Yes, sir.

Q. Did you know before putting on your brake

(Testimony of Robert B. Hawkins.)

on your trailer the first time back to the north that there was ice on that road? A. No, sir.

Q. You had seen some snow up there on the bridge, hadn't you? A. Yes, sir. [396]

Q. And as you went along you observed more snow and more ice all the time, didn't you?

A. Yes, sir.

Q. What was the first thing you did after the collision—wait a minute, I will withdraw that—What happened when the two vehicles collided?

A. Well, when the two vehicles collided they immediately burst into flames.

Q. Did you observe what part of the two vehicles collided, that is, which part with the other part?

A. As well as I remember the east, the lefthand corner of the bus hit the left side of my truck about half way back in the gas tank.

Q. Was that just right at the rear of your cab?

A. Just exactly back of the cab, yes, sir.

Q. What happened to you at that time when they first hit; did you pass out or?

A. No, I didn't pass out but I was hurt so bad that I was momentarily stunned and I do remember it roasted my head off and flame came up under the door on the lefthand side of the cab and across my face and burned whiskers off my face and here off the side of my head and it brought me out of it pretty fast.

Q. And when that happened did you proceed to do something?

(Testimony of Robert B. Hawkins.)

A. Yes, sir, proceeded to get out of the truck.

Q. Was your motor left running? [397]

A. No, sir, I turned the switch off.

Q. When did you turn the switch off?

A. Just after the impact.

Q. And when you got out of that truck was there somebody else in the truck with you?

A. Yes, sir.

Q. Who was that?

A. A boy by the name of Taaffae.

Q. Do you know where he is at this time?

A. No, I don't.

Q. Have you heard where he was?

A. I have heard, yes.

Q. Where?

A. I heard he was in Venezuela, in the Army.

Q. His name was Richard Taaffae?

A. Yes, sir.

Q. He was your helper on that trip?

A. Yes.

Q. That is, helper for the handling of the equipment?
A. Yes, sir.

Q. When you climbed out where was Mr. Taaffae?

A. Mr. Taaffae was sitting in the seat with his head against the dash; he was knocked unconscious.

Q. And how did you get out?

A. I climbed over him and opened the door and got him and pulled him out.

Q. In other words, you got out which door? [398]

A. I got out the right door.

(Testimony of Robert B. Hawkins.)

Q. And you were the first one out of the truck?

A. Yes.

Q. And you pulled Taaffae out? A. Yes.

Q. What did you do with him?

A. I drug him off to the side of the road about 20 feet and let him lay there.

Q. Then what did you do?

A. Well, I immediately tried to help save what passengers there was in the bus.

Q. Can you tell us what you did about that?

A. Well, there was an emergency door on this bus that was locked and there was no way to get into it from the outside without breaking it in and I went back to the truck and climbed up on the back of the truck.

Q. That is the tractor part of your equipment, is it not? A. Yes, sir.

Q. Go ahead.

A. Climbed up the back side of the truck and went to the left side of it where we carried our wrecking bar sticking in this winch rig you spoke of.

Q. The rack?

A. Yes. Got it out and tried to pry the door open and couldn't with this rigging bar, so I broke out about three of the windows and pulled some of the passengers out.

Q. On which side did you break those out? [399]

A. On the bus?

Q. Yes.

A. It would be the left side of the bus with the bus headed north.

(Testimony of Robert B. Hawkins.)

Q. On the west? A. Yes, sir.

Q. On the back end of the bus?

A. Back end of the bus.

Q. How many passengers did you help out?

A. We helped get three out as well as I remember, and then I also returned to the truck and I thought about the fire extinguisher that I had and I got it, which was on the left side of the truck mounted over this gas tank to the headache rig, but the fire had gotten so intense around the side, the fire extinguisher that it had burned the hose of the fire extinguisher. There was only approximately a couple inches was left in the fire extinguisher and you couldn't do much good trying to squirt this fire fluid on this fire so I passed the fire extinguisher through one of the holes we knocked out with the bar in the window on the bus and it exploded itself and threwed that foamite.

Q. How many did you help out of that bus?

A. As well as I remember I believe it was three passengers.

Q. Your helper was unconscious all that time?

A. Yes, sir. [400]

Q. Did someone else arrive and help?

A. Well, there was several people arrived. I couldn't say just who they were. I believe one of them was this farmer that testified this morning, was it Mr. Sinns?

Q. Sinn.

A. I believe he was one. But I could not state as to who was there or how many. I was so busy

(Testimony of Robert B. Hawkins.)

helping these passengers out of this bus and hurt pretty bad myself that I didn't have much chance for observation.

Q. Did you go back at any time to look at tracks?

A. No, sir, I never did.

Q. Did you go into the hospital from there?

A. Yes, sir.

Q. And what was your condition as to your physical condition?

A. When I arrived at the hospital, I later after two hours found I had three vertebrae broken in my back and five ribs.

Q. Mr. Hawkins, was there anything looking back at it that you could have done after hitting that ice to stop that accident?

Mr. Lush: I object to that as a conclusion, your Honor.

The Court: Well, yes, you can inquire whether he can think of anything that he might have done to have changed [401] conditions or if he has to show you or that he knows that he did or that he could do.

Q. Have you told all you know about what happened immediately preceding the accident from the time you struck the snow and the ice?

A. As well as I can remember, yes, sir.

Q. There was nothing then that you know now that you left undone at that time that a trucker should do after hitting ice to avoid that accident?

A. No, sir, nothing I can think of.

Mr. Goppert: That is all.

Mr. Goppert: If the court please, I have the

(Testimony of Robert B. Hawkins.)

makings of this equipment that counsel wants to stipulate in the record and I will be glad to stipulate with counsel that the tractor portion of this equipment was 26 feet 6 inches in length, 7 feet 11 inches in width, 9 feet 3 inches in height to the top of the cab, weighing approximately 26,000 pounds. And that the trailer portion was 27 feet long, that is, the separate unit; 7 feet 11 inches wide, and the height of the bed was 50 inches from the bottom of the tires; and the unladen weight was 12,600 pounds; and that the over-all length of the two units, the two pieces of equipment when coupled together was, as a unit was 45 feet 2 inches.

Mr. Lush: We so stipulate, your Honor. [402]

The Court: Very well.

Mr. Goppert: That is all.

Cross-Examination

By Mr. Lush:

Q. Now, Mr. Hawkins, if I understand your testimony correctly, you stated that when you first saw there was any snow or ice on the road was when you were opposite from certain trees on the west side of the road? A. Yes, sir.

Q. Now, looking at this plat can you identify which trees it was that you were opposite? I might help you by pointing out that this is the bridge, this is the driveway leading to the house on the west, this is the driveway leading to the Martin Lamb house here, this is the irrigation lateral, and that I think you referred to as a little hump. Now, with

(Testimony of Robert B. Hawkins.)

those land marks can you tell me what trees you were referring to?

A. I imagine it was these trees here.

Q. At the irrigation lateral? A. Yes, sir.

Q. And that was the first time you saw any ice and snow, is that right?

A. That is the first snow and ice.

Q. Had encountered coming down from Basin? Did you encounter wet road coming down from Basin? A. No, sir. [403]

A. And were there any spots of ice that you observed coming down from Basin? A. No, sir.

Q. Any spots of snow that you observed?

A. No, sir.

Q. And when you got to the crest of that irrigation lateral did the snow immediately start to cover the highway right there or was it ice for a ways or what was it?

A. It seemed to me like there was ice for a short distance and then snow on through the bridge and across it.

Q. Now then, if I get your picture correctly you were coming down clear blacktop with nothing on top of it, no snow, no ice, no nothing?

A. That is right.

Q. Then you hit some glare ice with no snow on top of that?

A. That is the way it appeared to me.

Q. It appears to you; is that the way it was?

A. Yes.

Q. And then you came and beyond that you later

(Testimony of Robert B. Hawkins.)

found by skidding that you had ice with snow on top of it? A. Yes, sir.

Q. Now, would it be possible from your observations for anybody to walk down that road from the scene of the accident to the heighth of that lateral without finding that change in the road?

A. To walk down it?

Q. Yes, without being able to see that change in the character of the roadway?

A. I don't know about walking down it; I didn't walk [404] back up the road.

Q. Well, you see the same things with your eyes regardless whether you are driving or walking, don't you? A. Approximately.

Q. Then would it be possible for anybody to walk back from the scene of that accident up to the irrigation lateral and not see the change in the road condition that you have testified to?

Mr. Goppert: That is objected to as being repetitious.

The Court: Yes, I think so.

Q. (By Mr. Lush): Where were you when you first saw the bus?

A. I imagine I was about possibly three blocks from it.

Q. From what? A. The bus.

Q. From the bus, and where were you with reference to the positions on this map?

A. Right along in here, where these first trees.

Q. Right along by the irrigation lateral when you first saw the bus? A. Yes.

(Testimony of Robert B. Hawkins.)

Q. You never saw the bus before that?

A. Not that I recall.

Q. Where was the bus then?

A. He was south of the bridge.

Q. Yes, here is the bridge. Where? About how far south?

A. I couldn't definitely state. It looked like we were [405] both about the same distance.

Q. It looked to you like you were both the same distance from the bridge. Now, as you came down from the north you do not recall having seen the bus before you topped the irrigation lateral, is that it?

A. Yes.

Q. Now, you were driving a West Coast Special?

A. Yes.

Q. And when the crash occurred the impact knocked the bus north of the bridge?

A. Yes, sir.

Q. You were still in the, at the wheel of the truck?

A. Yes.

Q. Were you thrown in any direction?

A. Just forward against the wheel.

Q. Forward against the wheel?

A. Yes, sir.

Q. How about forward against the top?

A. No, sir.

Q. You were not?

A. No, sir.

Q. How far is the top of that just from the top of that truck cab from the top of your head when you are riding?

A. I couldn't say. I imagine it was a foot.

(Testimony of Robert B. Hawkins.)

Q. You think it was maybe a foot?

A. Yes.

Q. Not any more than that?

A. No, I wouldn't say it was.

Q. And you estimate that your speed as you were coming over the top of that hump was 35 miles an hour?

A. As well as I could estimate it.

Q. Actually you were going considerably faster than that? [406]

A. No, sir.

Q. Why then why—the road was dry, was it not?

A. The road was what I would call a dry road.

Q. Then why were you holding your speed down to 35?

A. Well, this was a new outfit and that seemed that like that was the right speed to drive that outfit.

Q. And when you are driving this outfit how far above the pavement would your eyes be?

A. Sir?

Q. How high above the pavement would your eyes be when you are driving this outfit?

A. When you are sitting in the cab?

Q. Yes. That is where you drive it from.

A. Some people are taller. I might have been possibly seven feet.

Q. About seven feet you think?

A. From the pavement.

Q. The height of the outfit is agreed here to be nine feet three inches. Do you think your eyes were two feet three inches lower than the top of the cab?

(Testimony of Robert B. Hawkins.)

A. I am just merely estimating it; I don't know. I never measured it.

Q. Wouldn't your eyes be closer to eight feet high at that point? A. I couldn't say.

Q. You couldn't say? Do you think they would be between seven and eight feet?

A. I was estimating it when I said seven feet because I [407] really don't know.

Q. Now, did you observe any ice and snow on the road before you reached this driveway down here? A. I noticed the snow on the bridge.

Q. You noticed the snow on the bridge?

A. Yes.

Q. Where were you then when you noticed the snow on the bridge? A. Right here.

Q. At the irrigation lateral you noticed the snow on the bridge? A. Yes.

Q. Did you notice the snow between you and the bridge?

A. I noticed it extended north across the bridge some distance.

Q. For some distance but when you came across the top of that lateral you hadn't yet noticed it?

A. I hadn't noticed the snow.

Q. Where did you reach the snow?

A. I imagine about half way between the first tree and the bridge.

Q. Now, if the first tree is at the irrigation lateral and the bridge is 425 feet south, then you would say it was around 200 feet down the road from the irri-

(Testimony of Robert B. Hawkins.)

gation lateral? A. That would be my guess.

Q. And about a little over 200 feet north of the bridge itself? A. That is right.

Q. So that in your opinion there was no snow south, north [408] of the Martin Lamb driveway, is that right? A. That is the way I remember it.

Q. Was there snow north of this driveway here?

A. Well, I couldn't say as to that.

Q. Now, the first time you observed any snow ahead of you on the road was when you passed that irrigation lateral? A. Yes.

Q. Were you keeping a look out as you drove that truck ahead?

A. You naturally have to keep ahead.

Q. How far ahead?

A. That is according to your road how far ahead you can see. You have to look ahead as a rule far enough to try to drive at a reasonable speed.

Q. Now, looking south down the road toward Worland from this irrigation lateral you can see down the road a long ways, can you?

A. I believe you can see quite a ways.

Q. And did you look down ahead of you?

A. Yes, sir. That is when I seen the bus.

Q. That you testified was when you went over the irrigation lateral?

A. That was the first chance I had of seeing down that far.

Q. Couldn't you see down that far from back farther? A. Not too far. [409]

Q. Why not?

(Testimony of Robert B. Hawkins.)

A. Well on account this was on the other side of that rise to start with.

Q. How high is that rise?

A. I couldn't say. I know there is a rise there in the road.

Q. Are you familiar with maps? If this map represents one foot of rise here, that is one foot rise for each one of those little blocks, then from the lowest point back here to the top of that rise we actually have only slightly over four feet, isn't that true? Doesn't the map show just slightly over four foot rise between this spot back here and the high point there?

A. I don't know as to that, what the height would be.

Q. Well this is drawn to scale, is it not? This scale is one inch equals ten feet on a horizontal, and these all represent one foot. So the lowest point on the road back here visible on this map was not as low as the height your head was above the pavement, was it, if your head was seven feet above the pavement? A. I don't know.

Q. From the low point visible on this map you could always look over the top of that hill and see the road ahead, could you not? Well isn't that the true fact with reference to the road—never mind the map—couldn't you always see ahead over the top of that hill and see the road and the [410] character of the road ahead of you? There isn't any place visible on this map you couldn't have

(Testimony of Robert B. Hawkins.)

looked ahead of you and seen the road was covered with snow there over the top of that hump?

A. I could see the road was covered with snow the other side of the bridge.

Q. The answer to that was you could see there was snow beyond the bridge, is that right?

A. Yes.

Q. And you could see that from any place visible on this map, is that true?

A. I couldn't say as to that whether anywhere on that map.

Q. Well you could see from a long distance back that the road beyond the bridge was covered with snow, could you not?

A. I could see some distance back.

Q. Now what did you do with reference to reducing your speed before you came over the top of that hill?

A. I cut it down.

Q. To what?

A. 35 miles.

Q. And how fast had you been driving?

A. Well I couldn't have been driving over 45 and possibly not over 40.

Q. So you dropped your speed 5 miles an hour?

A. Yes.

Q. Now didn't you just tell me 35 miles was the right [411] speed to drive that vehicle and that is why you drove it?

A. 35 to 40.

Q. But before you came over the hill you were going 40?

A. It was possible to go 40.

Q. I asked you if it was possible you were going

(Testimony of Robert B. Hawkins.)

faster than that and you answered no you thought that was the speed to drive the vehicle?

Mr. Goppert: That is objected to as being repetition and argumentative.

The Court: Yes, I think so.

Q. (By Mr. Lush): Now, Mr. Hawkins, you have testified that in the past on occasions when driving a truck over these roads that you have come upon ice and skidded without ever touching your brakes, is that right?

A. Yes, it is possible.

Q. I didn't ask you if it is possible. Has that been within your experience?

A. Well I can't remember as to that. It could have happened.

Q. And if you do skid without touching your brakes because you are on icy road, is the proper thing to do then to apply your brakes?

A. Well it is according to where you are at.

Q. What was the condition of the road at the place where the Highway Patrolman inspected your brakes up at Basin? [412]

A. It was good.

Q. Where he inspected your brakes?

A. The road was good.

Q. Dry? A. I would say so.

Q. What experience had you had driving truck on that Highway 20 north of Worland?

A. Sir?

Q. Had you had previous experience driving truck over that highway north of Worland?

(Testimony of Robert B. Hawkins.)

A. I have been over it at times.

Q. Over what period of time?

A. Well, I would have to figure that. Over a period of about eleven months I had had occasion to make trips up over it. I couldn't say how many or how few.

Q. Could you give us an estimate?

A. No, I couldn't give you an estimate. I have been over it.

Q. Do you know the road?

A. Comparatively well, yes.

Q. Are you familiar with the system of highway markers used in Wyoming?

A. Well I use to be. I couldn't say I am now. I have been gone.

Q. Were you at that time? A. Yes, I was.

Q. Does the State of Wyoming put out signs as you approach narrow bridges?

A. I think so.

Q. Did you see any such sign at the approach to this [413] bridge?

A. I don't remember of it.

Q. Actually this bridge was not a narrow bridge, was it? A. There is narrow bridges.

Q. That doesn't answer my question. I said this is not a narrow bridge, is it?

A. Well, I don't suppose it could be classed as a narrow bridge.

Q. Actually it is wider than the blacktop, is it not?

A. I never did measure the bridge.

(Testimony of Robert B. Hawkins.)

Q. Now what was the travel condition as you drove over that road, Mr. Hawkins? Did you meet many vehicles?

A. I don't recall whether I did or not.

Q. You don't know whether the travel was heavy or light?

A. It don't seem to me like there was very much traffic over it as I remember it but I couldn't say positively.

Q. Now at what speed do you ordinarily drive a rig such as the one you had there over icy roads?

A. Well if I knew I was on ice I would be driving pretty slow.

Q. Well if you knew you were on ice at what speed would you drive a rig of that kind?

A. Whatever speed I deemed as safe; that could vary.

Q. It could vary?

A. Yes, and it would also vary on the gear you were in.

Q. What gear were you in? [414]

A. I was in fourth gear.

Q. Out of how many gears?

A. Well in the transmission out of five.

Q. Out of five. You had five speeds forward with the transmission, is that right? A. Yes.

Q. And how many do you have in the differential? A. We had three and an auxiliary.

Q. Three and the auxiliary? A. Yes, sir.

Q. And does the auxiliary pull you faster than the regular transmission?

(Testimony of Robert B. Hawkins.)

A. Not necessarily.

Q. Are they higher gears?

A. They are lower.

Q. They are lower gears? A. Yes.

Q. So you were in the next highest possible speed of the truck, is that right?

A. No, I was in fourth on direct.

Q. Fourth in direct? A. Yes.

Q. And there were five direct gears, is that right? A. Yes.

Q. Well you said your auxiliary gears were lower than the others? A. Yes.

Q. Now what other higher gears would you have than the one you were in?

A. You would have several. You have a combination there. If you know how to shift your gears, you can get half a gear up or down with your auxiliary, work it in a combination. [415]

Q. Where were you on this map when you first skidded?

A. Just after I passed that bunch of trees.

Q. And you think that is the irrigation lateral? The irrigation lateral—there is the first tree—first bunch of trees, now which?

A. Somewhere along the trees.

Q. Somewhere there and you don't know just where, and were you out of control at the time?

A. At the time I skidded?

Q. Yes, when you first skidded?

A. No, I—when I first applied the brakes to the

(Testimony of Robert B. Hawkins.)

trailer it didn't seem like I could check them because I didn't have any load on the trailer and I couldn't get any traction so, of course before that I didn't realize I was on ice until I did apply the brakes when I couldn't do any good at checking it and that is when I tried to check it with my foot brake and that is when it apparently hit some rough places on that road, ice, snow, or something and started the trailer into a swerve as well as I remember.

Q. Do you have the idea that your trailer went into a swerve before your tractor did?

A. Yes, sir.

Q. And where were you when that trailer went into the swerve?

A. I was somewhere along them trees.

Q. Those trees extend pretty steadily from the irrigation lateral down to the scene of the accident, do they not? [416]

A. I really couldn't say. I never looked at the time and I haven't been back down there since.

Q. Can you place your position by anything other than those trees?

A. No, that was about the only thing that I had in my mind as to where it started to skid.

Q. You have driven over the roads in Wyoming before in the winter? A. Yes, sir.

Q. And you have driven from dry highway on to icy highway before?

A. Well I don't just recall going on to it as abrupt as I did on that particular place.

(Testimony of Robert B. Hawkins.)

Q. Where did you go after you left the hospital in Worland? A. Where did I go?

Q. Yes.

A. You mean when I left the hospital?

Q. Yes.

A. I went to the hotel in Worland.

Q. And how long did you stay there?

A. I stayed there over night until some time after noon the next day.

Q. And where did you go from there?

A. I went to Casper, Wyoming.

Q. And how long did you stay in Casper?

A. After I got in Casper? [417]

Q. Yes.

A. Well I was—I went to the hospital and I don't remember just exactly when I got out and I was there I guess, approximately I think until some time in June.

Q. And where did you go from Casper?

Mr. Goppert: Your Honor, we object to this line of questioning as irrelevant and not proper cross-examination.

The Court: Well you covered that in your direct examination. You traced him to some place out in Washington. Now he is retracing on cross-examination. Overrule the objection. Proceed.

A. Where did I go when I left there?

Q. Yes. A. Oklahoma City.

Q. Did you continue to work for Manning?

A. No, sir.

(Testimony of Robert B. Hawkins.)

Q. When was the last day you worked for Manning?

A. I couldn't definitely state that. I never kept any record of it.

Q. Did you ever do a day's work for him after that accident?

A. Yes, I went back on light work.

Q. As you came down the road from this driveway to the point of impact what was the position of your truck on the road, was it facing north and south or was it facing east and west? The truck part, the tractor part, not the trailer? [418]

A. The tractor?

Q. Yes.

A. This driveway or this driveway?

Q. I think you said you started to skid at the driveway on the west side of the road, did you not? That would be this driveway, the one where you started to skid?

A. Well when I first went into a skid I was on the west side of the road.

Q. Yes. And what was the position of your tractor as you came from that point down to the point of the accident?

A. It went across the road to the east side.

Q. And was the tractor facing north and south or east and west or northeast and southwest or what was the position of the tractor?

A. The tractor as well as I remember was com-

(Testimony of Robert B. Hawkins.)

paratively north and south until just before the impact it started to come back from the east side to the west side of the road.

Q. In other words, you were going generally north and south with your tractor up until just a few seconds before the impact?

A. A very few seconds.

Q. You didn't skid sideways down the road at all?

A. It might have been in a very small, but as well as I can remember it seemed like it straightened out comparatively straight and then turned across the road to the opposite side just before the impact. [419]

Q. Did you keep your eyes on the bus as you were sliding down the road?

A. Well I could see it.

Q. And where was the bus to the best of your recollection when you started sliding?

A. Well he was approaching the south side of the bridge.

Q. He was approaching the south side of the bridge when you started sliding here, is that right?

A. Yes.

Q. And there was no visible place for him to go except across the bridge, was there?

A. I couldn't say as to that. I don't know.

Q. Is there any reason why you couldn't have driven your rig off the lefthand side of the road and up into the yard?

A. I couldn't get those front wheels turned.

(Testimony of Robert B. Hawkins.)

Q. Weren't you going in a northerly and southerly direction?

A. When you are sliding on that ice you can't control those wheels.

Q. With your rig sliding in a northerly and southerly direction you mean you couldn't turn off that road and go up into the yard? A. No.

Mr. Lush: That is all.

Redirect Examination

By Mr. Goppert: [420]

Q. How old are you? A. Forty-eight.

Q. You were forty-six at the time of the accident? A. Yes.

Q. What Highway Patrolman was it that inspected your outfit at Basin, if you know?

A. Keith Ward.

Q. You stated that you never measured that bridge; did it appear as you approached it from the north before you applied any brake to be narrow?

A. Yes, it did appear to be.

Q. And did you attempt or were you going to try to beat somebody to the bridge?

A. No, sir, I was going to try and stop and give the bus the bridge.

Mr. Goppert: That is all.

Mr. Lush: Mark that for identification.

(Testimony of Robert B. Hawkins.)

Recross-Examination

By Mr. Lush:

Q. Calling your attention to Plaintiff's proposed Exhibit No. 17, I will ask you is that a fair representation of what you saw as you came in a southerly direction with reference to the bridge except for the snow?

A. I couldn't say because I don't know how that picture was taken. [421]

Q. Well does it look like the scene looked at that time except for the condition of the snow on the road?

A. I couldn't definitely answer yes or no to it. It could be the way it looked. I couldn't say whether it looked like that or not.

Mr. Lush: That is all.

Mr. Goppert: That is all.

KEITH WARD

was called as a witness for defendant, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Jameson:

Q. Will you state your name, please?

A. Keith Ward.

Q. Where do you live?

A. 718 Wall Street, Chico, California.

Q. And what is your present occupation?

A. Police Officer, Chico Police Department.

(Testimony of Keith Ward.)

Q. How long have you been a Police Officer in Chico?

A. In Chico for approximately two years.

Q. And prior to the last two years where were you?

A. I was employed as inspector on the Wyoming Highway Patrol.

Q. And prior to being inspector were you employed by [422] the Wyoming Highway Patrol?

A. I was employed as Patrolman.

Q. How long were you employed as Inspector?

A. Nine months.

Q. How long as Patrolman?

A. A year and two months.

Q. Will you tell the court the respective duties of the Patrolman and Inspector?

A. A Patrolman handles automobile accidents, crime, and does a certain amount of work with commercial vehicles as to permits and safety inspections, and an Inspector's work is primarily concerned with commercial vehicles. An Inspector has a trailer house and in substance has a mobile port of entry for all commercial entries as to proper permits and safety operation of commercial vehicles. We assist Patrolman whenever requested and took care of any emergencies that arose that we were called on where a Patrolman wasn't available to.

Q. Prior to your employment by the Highway Patrol of Wyoming what did you do?

A. Three years, United States Army.

(Testimony of Keith Ward.)

Q. You were employed after your discharge from the Army as a Highway Patrolman?

A. Yes.

Q. Then during the three years you were employed as Highway Patrolman and Inspector did you have occasion to [423] investigate a large number of accidents in Wyoming?

A. Yes, I had quite a large number of accidents.

Q. And were you called on to investigate an accident on December 27th, 1946?

A. Yes, I was.

Q. The accident in which this action is involved?

A. Yes.

Q. Now, Mr. Ward, where did you first see either of the vehicles involved in this accident?

A. When I was working approximately a mile north of Basin on Highway 20 I had a checking stop setup there, and the town Marshal from Basin came out and told me approximately 3:05 in the afternoon that there had been an accident involving a Burlington bus and a car about nine miles north of Worland and they wanted to know if I would come up and investigate as they were unable to get hold of a Highway Patrolman. I said yes I would go and asked him if he would like to come along and he said he would so we got in my car and started for the scene of the accident.

Q. Now, Mr. Ward, prior to that time had you inspected the truck of the Manning Company that was involved in this accident? A. Yes.

Q. I think we will go into that before we go

(Testimony of Keith Ward.)

into the accident itself. Will you tell us about that inspection?

A. Well Mr. Hawkins drove his truck and trailer, the International West Coast Special, into my checking station [424] oh, approximately in the neighborhood of forty-five minutes before the accident occurred, and he came to a sliding stop at my checking station, as all drivers do who are familiar with my way of working did, and got down from his cab. I checked his truck for a permit for operation as it was a new vehicle. I went around and checked the brakes, checked the brake marks on the road to make sure all brakes were holding, which they were. I checked his brake connections from the tractor to the trailer, and for flags and flares, just a routine inspection we generally run.

Q. Now what would you say with respect to the condition of the brakes and the brake connections from the examination you made at that time?

A. Well the brakes were connected from the tractor to the trailer; if they hadn't been, I would have stopped his vehicle from operation.

Q. If you found anything mechanically wrong with the truck, what would you have done?

A. I would have taken his rig up and based it. He would have had to repair whatever is wrong before he could go on. If his tractor was defective, he would have to leave it. It was in proper working order.

Q. Did I understand you to say you checked all the brakes on both the tractor and the trailer?

(Testimony of Keith Ward.)

A. Yes.

Q. And what did you find with respect to the condition [425] of the brakes on both the tractor and the trailer?

A. They seemed to be in the proper working order. At least I watched him stop in front of my car. It was the only truck on that particular stretch of highway at the time. I watched his stop and observed the brakes were and the connections were properly made. I observed that later.

Q. What was the condition of the highway at that point?

A. The highway at that point was dry.

Q. Now then I believe you said at about 3:05 you received this call from the town Marshal of Basin, and then that you asked him if he wanted to accompany you to the scene of the accident and he did so, is that correct?

A. He said yes he would like to go along.

Q. Now will you next then, Mr. Ward, describe to us your trip from that point, which I understand is one mile from Basin, is that correct?

A. A mile north.

Q. A mile north. Your trip from a mile north of Basin to the scene of the accident?

A. Well from a mile north of Basin the road was clear. The road was clear from that point down to very close to the scene of the accident. The road was clear and dry. There was snow on the shoulders but the oilmat was clear up to just a short distance from the scene of the accident.

(Testimony of Keith Ward.)

Q. Could you fix that point with reference to any natural object, Mr. Ward, or with reference to the plat which is marked [426] Plaintiff's Exhibit 1?

A. Well it is approximately 400 feet north of the scene of the accident that I first noticed it at the start of this line of trees because the wind evidently did not hit in there to blow the snow clear of the road.

Q. And that is where you first observed snow and ice on the highway, is it?

A. That is where it first came to my attention.

Q. Well from the point you traveled from a mile north of Basin to that point the road was clear?

A. The road was clear and I made good time coming down.

Q. What speed did you travel for that distance?

A. My speedometer—I had a four speed 1946 Ford Panel truck. The speedometer only goes to 60 miles an hour. I traveled mostly at 60 or a little better all the way down.

Q. Mr. Ward, do you recall anyone passing you on that trip to the scene of the accident?

A. Yes, Dr. Walker passed me.

Q. And about what speed was he traveling?

A. He passed me going pretty fast.

Q. You were going how fast?

A. I was going an even 60 when he passed me.

Q. Now, Mr. Ward, you traced it down to a point some 400 feet north of the scene of the accident?

A. Right.

(Testimony of Keith Ward.)

Q. Will you tell us what happened so far as your travel [427] between that point and the point of the accident?

A. I started to slow down before I got to the ice and I was going, oh, I would say 40 to 45 when I got on the ice, and Dr. Walker was stopped in front of me and I couldn't stop without hitting him and I had to take off to the left and go around him up to the scene of the accident.

Q. What was the condition of the highway there?

A. It was found there there was snow and ice on the highway, snow in some parts was knocked loose; it was more or less uneven looking, rough and slick.

Q. Now did you say you slipped or skidded or something of that kind?

A. I did, yes. I had to swerve left of the Doctor's car and I had quite a time stopping my car.

Q. You had a difficult time stopping your own car? A. I did, yes.

Q. Now, Mr. Ward, what did you first do after you arrived? First of all where did you stop your car?

A. I stopped my car, oh, it would be about 25 or 30 feet north of the tractor.

Q. On which side of the highway?

A. On the lefthand side. I left it there. There was no particular danger there because no traffic was going through.

(Testimony of Keith Ward.)

Q. And then will you just go on from there and tell us [428] what you did at the scene of the accident?

A. The first thing I done I got out of my car and went back to the Doctor's car and told him to keep his vehicle down to legal speed limit. And he said he was taking a nurse to the hospital. And I said regardless of that you do not have an emergency vehicle and it would be advisable to you to keep it down to at least 60. Then I returned up to the bus and Sheriff Nicola was standing at the back of the bus and I asked the Sheriff how many he thought were still in the bus and he said, I don't know, about two. I said, are there any injured still at the scene? He said, I believe there's somebody at the farm house. I believe it would be this one.

Q. Would that be what was described as the Lamb farm house or Piel?

A. Piel. This is Lamb's here.

Q. Yes. A. This is Piel.

Q. Then it was the Piel farm house?

A. Yes. I had two first aid kits in my car and I went to the Piel ranch to see if I could be of any help to whatever injured there were. And I got inside of the farm house and Mr. Brownell was there and the Doctor from Worland was there at the time giving him plasma I believe. Since the Doctor was there there was nothing I could do in the way of first aid. The Doctor was handling the case and he was the [429] only injured man left there. I volunteered the services of my panel truck as an ambulance as I had a bed in the back of the

(Testimony of Keith Ward.)

panel truck, and the Doctor said no they couldn't move him and they were bringing an ambulance out and it would be a little while before they could move him. So I went back to the scene of the accident and the Sheriff and I while waiting for the fire to die down so we could move the bodies there, made an investigation of tracks, measured the tracks both north and south of the accident.

Q. You say you and the Sheriff measured the tracks north and south of the accident?

A. Yes, and the position of the vehicles.

Q. First of all will you tell us briefly the position of the vehicles?

A. Well the bus was approximately three feet north of the bridge. The rear end of it was 5 or 7 feet from the west side of the road and the majority of the bus was along the south edge of this little road in here on the east side. And the end of the bus was there; it wasn't in the ditch. We walked along the edge; it was right on the very edge. We had to walk down on the slope of the ditch to get to the front door to remove the bodies. And the tractor was 18 inches from the bus with the front end pointing up in this direction; that would be southwest and the rear end facing northeast. The trailer had been disconnected from the truck and was [430] down here in the ditch with the nose end of it just about it would be a little on this road down here.

Q. Then, Mr. Ward, you said that you and the

(Testimony of Keith Ward.)

Sheriff together examined the tracks both north and south of the scene of the accident?

A. That is right.

Q. Calling your attention to Defendant's Exhibits Nos. 5 and 6, I will ask you if they correctly portray the tracks north of the scene of the accident as you recall them?

A. Well they are not as clear as they were when I was there but generally I would say they portray.

Q. Generally they are the same but the tracks were clearer when you examined them at the scene of the accident?

A. They seemed to be deeper.

Q. The tracks seemed to be deeper than they show on these two pictures? A. Yes.

Q. Now, Mr. Ward, could you trace those tracks to any particular point?

A. Well the tracks extending from the back wheels of the tractor, the drive wheels of the tractor diagonally across the road we could trace those back approximately, we couldn't trace them directly to the back wheels of the truck because the fire melted them off, but right in line with the back wheels approximately 150 feet. I paced that. That was 50 paces, three foot paces.

Q. And from your observation there were you able to form [431] an opinion as to which wheels had made those tracks?

A. Yes, sir, it is my opinion that the back wheels of the tractor made the deep impression, the dual track in the road.

(Testimony of Keith Ward.)

Q. Yes, those are the tracks you described which are shown in Defendant's Exhibits Nos. 5 and 6?

A. Correct.

Q. Now did you observe there any tracks made by the front wheels?

A. No, I couldn't find no evidence of any tracks by the front wheels at all.

Q. And what would that indicate with respect to the front wheels?

A. That would indicate to me he had his front wheels turned going with the skid attempting to bring it out and that the wheels were still turning and that they were not locked.

Q. Now on the basis of the examination you made and the testimony you have given here now on these vehicles could you form an opinion as to whether the wheels were locked?

A. I would say they were not locked because if they had been locked, the front wheels regardless which way they had been turning would have made an impression on that snowy surface.

Q. And you didn't find any such impression?

A. There was no impression of the front wheels at all. [432]

Q. And did I understand you to say it was your conclusion from that the front wheels turned with the skid?

A. Yes, they were slightly turned that way when I arrived.

Q. Now will you describe for us, Mr. Ward, the

(Testimony of Keith Ward.)

marks on the highway you observed south of the scene of the accident?

A. Between this driveway and a point just a few feet from the Bridge there is a dual mark on the shoulder of the road in the soft snow.

Q. When you say "this driveway" that is the driveway 165 feet from the, marked 165 feet from the bridge?

A. It was somewhere in between here.

Q. Somewheres in that distance?

A. Yes. Closer to the bridge than it was the driveway.

Q. And what did you observe there?

A. Well there was a dual track there as evidence a dual wheeled vehicle had traveled for a distance down the side of the road on the extreme edge and part of the shoulder of the road where the soft snow was you could pick up that track.

Q. And where did those tracks end, that is, at the north?

A. Right about at the bridge.

Q. Were you able to form any opinion, Mr. Ward, as to what vehicle had made those marks?

A. Well I couldn't say for sure but it was probably the bus. [433]

Q. You couldn't be positive of that?

A. I couldn't be positive because it was not distinct enough due to the heat on the bridge and the fact that the track it didn't appear to be a skid mark to me; if it had been a skid, it would have

(Testimony of Keith Ward.)

extended on to the bridge but it probably was the bus.

Q. Mr. Ward, following the accident did you drive into Worland?

A. Yes. After we conducted our investigation we removed four bodies and part of a fifth and put them in the back end of my truck and went around the accident, and backed up here and asked the Sheriff if he had a wrecker coming to remove the vehicles and he had, and I drove from there to the undertaker's establishment in Worland where I unloaded the bodies.

Q. What time did you leave the scene of the accident for Worland?

A. I don't recall as to the time.

Q. Will you describe for us the condition of the highway between the scene of the accident and Worland, particularly with reference to whether there was any snow or ice?

A. Well there was hard packed snow from the scene of the accident right through right into Worland. It was hard packed snow and it was rough and slippery and dangerous road to travel especially with an outfit like I had.

Q. You had a panel truck? [434]

A. I had a panel truck but it has truck springs.

Q. About how fast did you travel?

A. I don't think I exceeded 30 miles an hour, 25 the majority of the time.

Q. Mr. Ward, what would you say was a safe

(Testimony of Keith Ward.)

speed from the point a mile north of Basin to a point some four to five hundred feet north of the scene of the accident? A. From Basin?

Q. Yes.

A. To that point, well the legal speed there would be 60 miles an hour.

Q. And would you say that would be a safe speed for that part of the highway?

A. That was a safe speed; I maintained it all the way down.

Q. And what would you say was a safe speed from the scene of the accident into Worland?

A. Into Worland I would say not over 35 miles an hour.

Q. Did you prepare a report of your investigation, Mr. Ward? A. Yes, I did.

Q. And will you state how that report was prepared?

A. Well that report was prepared by myself, the Sheriff, Under-Sheriff and Patrolman Wickam from combined investigation of the whole group. We got together in the Sheriff's office the morning after the accident. The night before we had [435] been to the hospital and questioned both the drivers of the vehicles involved and as many witnesses as we could find that could talk and that had actually seen enough to be of any value as to what happened and we took those statements and combined those statements and our own investigations of tracks and conclusions into that report.

(Testimony of Keith Ward.)

Q. Then the report was typed and your three names were typed on the report?

A. I typed the report and the three names on the original report.

Q. Calling your attention to Plaintiff's Exhibit No. 10, I will ask you if that is a photostatic copy of the report that you prepared of your investigation?

A. Yes, this is a photostatic copy of that report.

Q. Then after the report was prepared what did you do with it?

A. We sent it in to Cheyenne.

Q. In to the Highway Patrol? A. Yes.

Q. Did you do anything else with it?

A. Yes, we showed the report to the County Attorney of Washakie County.

Q. And that was all? A. That was all.

The Court: Gentlemen, it looks as if we are not going to be able to finish this case tonight. How many more witnesses have you got? [436]

Mr. Jameson: This is our last witness.

The Court: Do you have some rebuttal?

Mr. Lush: I think only one, your Honor, but possibly two.

Mr. Jameson: It is perfectly agreeable to us, if the court please, to stop now.

The Court: I think perhaps we had better. We will adjourn until tomorrow morning at 10:00 o'clock. (5:10 p.m.)

(Court resumed, pursuant to adjournment, at 10:00 o'clock a.m. on May 19, 1949, at which time all counsel and plaintiff were present.)

The Court: Gentlemen, have you found a few more witnesses so you will take up the whole forenoon?

Mr. Jameson: If the court please, we are on our last witness.

The Court: How many have you got? You had one last night in rebuttal?

Mr. Lush: I think two, your Honor, but they will both be exceedingly short.

The Court: Can you finish by 11:00 o'clock? You know, if I were to rigidly enforce the rule, I would adjourn this case over because we have a jury here and a criminal case set for this morning, and I realize you gentlemen come from a [437] long distance and I don't want to embarrass you or handicap you in any way. I will take a chance on giving you an hour but I would expect a little more expedition than we had yesterday. It dragged along a long time yesterday with considerable repetition in the examination of witnesses. I don't blame you for that. I suppose we have all been guilty of that in days gone by but I will keep the jury here and I will hear this case if you will finish in an hour. You may proceed.

KEITH WARD

resumed the stand and testified as follows:

Direct Examination

(Continued)

By Mr. Jameson:

Q. Mr. Ward, at the close of the testimony yesterday I was interrogating you with respect to a photostatic copy of the report you made to the Wyoming Highway Patrol. I now hand you an instrument marked Defendant's Exhibit No. 18, and will ask you if that is a photostatic copy of the same report? A. Yes, it is.

Mr. Jameson: I might say, if the court please, we are offering this in evidence for the reason it is a little larger and we think clearer.

The Court: Any objection?

Mr. Lush: No objection. [438]

The Court: Very well.

(Whereupon said Defendant's Exhibit No. 18, being photostatic copy of accident report, offered and received in evidence, is a part of this record.)

Q. (By Mr. Jameson): Mr. Ward, calling your attention on page 2 of the Defendant's Exhibit 18, I will ask you if you drew the diagram?

A. Yes, sir.

Q. And in particular did you draw the tracks and the vehicles?

A. I drew the entire document.

(Testimony of Keith Ward.)

Q. Did you show that to the Sheriff and to Mr. Wickam, the other Highway Patrolman?

A. Yes.

Q. And did they agree that was a correct representation of the tracks and the vehicles as you saw them at that time? A. They did.

Q. Now calling your attention to the route of the vehicle No. 2, and particularly that part of it toward the south toward the bus, what have you to say with reference to what that shows with respect to whether the vehicle was coming out of a skid?

A. Well the curve at the end of the track indicates the vehicle, the tractor, vehicle No. 2, was coming out of the skid and regaining control and returning to his own side, the west side of the road. This was substantiated by the [439] statements of the witnesses; they agreed on that point that it was returning to its own side of the road at the time of the impact.

Q. There was some testimony, Mr. Ward, to the effect that at a certain point there was a panel truck driven by the Highway Patrolman that came from the north on the highway; as I understand it you were driving this panel truck?

A. That is correct.

Q. And what kind of vehicle did the other Highway Patrolman have?

A. He had a Ford four-door sedan.

Q. So that you had the only panel truck driven by a Highway Patrolman? A. Yes.

Q. First of all will you just tell us very briefly

(Testimony of Keith Ward.)

the course your vehicle took after you arrived at the scene of the accident?

A. At first I parked near the tractor, and then I backed it up into the farmer's yard, the road back, second road back, and then I backed it up to the back end of the tractor to load the bodies, and I went around the scene of the accident to the highway south of the bridge and backed up to ask the Sheriff a question and then straight on forward into Worland.

Q. Now as I understand it the first time you took your vehicle south of the bridge was after you had completed your investigation and had loaded the bodies, is that correct? [440]

A. That is correct.

Q. And then you went to the south side of the bridge and after that you backed toward the bridge to ask the Sheriff some question? A. Yes.

Q. Approximately how long would that be after you arrived at the scene of the accident?

A. Pretty close to an hour.

Q. You have been over this highway other times, have you, Mr. Ward? A. Yes, I have.

Q. I want to ask you as you traveled southward on the highway and particularly come over this rise in the highway to the north and looked toward the south what impression you have of the bridge with respect to whether it is a wide or narrow bridge?

A. Well it has the impression of a narrow bridge due to the fact there's a turn slightly and the road coming south goes straight up approximately to the

(Testimony of Keith Ward.)

bridge. The bridge sets slightly with the north end to the east. It has the look of a narrow bridge due to being set at an angle to the highway.

Q. Can you illustrate that on the plat, Plaintiff's Exhibit 1, very briefly?

A. The road coming in to here is straight. The road from about this point takes a curve. Coming on to the road you see the bridge is set on this curve instead of on this straight stretch of road. In other words, coming down on this [441] stretch north the bridge is set at an angle to this part and it sets straight with this part. The angle is very slight.

Q. Where were you on the highway when you first saw the truck and bus as you came to the scene of the accident?

A. Well that is rather hard to place. I was back, oh, five or six hundred feet approximately. I can't say for sure. I don't know just exactly when I did see it.

Q. I believe you said at some time before that you had seen the smoke?

A. I had seen the smoke.

Q. Did you go over that road again that night, Mr. Ward?

A. Yes, we had to after questioning the witnesses at the hospital, especially, Mr. Brownell. We were still three passengers short on the bus and we went back around midnight that night to search the bus for more bodies and we found two.

Q. And how far did you go on that trip?

A. Well I went all the way to Basin because we

(Testimony of Keith Ward.)

all stopped at the scene, the rest of the boys were in the Sheriff's car and I took my panel truck and I said as long as I am this far I am going to Basin and I will see you in the Sheriff's office at nine o'clock in the morning to make out the report.

Q. What would you say with reference to the condition of the highway between Worland and the scene of the accident as compared with the afternoon? A. It was about the same.

Q. And what about the highway north from the scene of [442] the accident to Basin?

A. Well from just a short distance north of the scene of the accident I would say as I said yesterday approximately four hundred feet from there to about Manderson it was about as clear as it was. It was unchanged from Manderson to Basin and had started to storm.

Q. It had stormed between Manderson and Basin? A. Yes.

Q. About how far is Manderson from the scene of the accident?

A. It is a good 10 or 12 miles.

Q. Then you came back to Worland the next morning? A. I came back the next morning.

Q. What was the condition of the road the next morning?

A. There was snow in Basin but the middle stretch a little this side of Manderson to the scene of the accident was clear and basically unchanged from the way it was the day before.

(Testimony of Keith Ward.)

Q. And all the way into Worland was about the same as the day before?

A. It was rough hard packed snow.

Q. You mentioned yesterday, Mr. Ward, that the town Marshal of Basin went with you to the scene of the accident? A. Yes.

Q. Do you know whether the Marshal is still living? [443]

A. As I understand it the Marshal is dead.

Mr. Jameson: You may cross-examine.

Cross-Examination

By Mr. Lush:

Q. Mr. Ward, is that a fair representation of the vehicles you met at the bridge as you come from the north to the scene of the accident?

A. Yes, I would say that is very good.

Mr. Lush: We offer in evidence Plaintiff's Exhibit No. 19.

Mr. Jameson: No objection.

The Court: It may be received.

Whereupon said Plaintiff's Exhibit No. 19, being a photograph of the scene of the accident, offered and received in evidence is a part of this record.

Q. (By Mr. Lush): Now, Mr. Ward, if I understood your testimony yesterday correctly, you said that these were, that is, the tracks that were marked 1 and 2 on Plaintiff's Exhibit No. 5, that you examined, are those the tracks to which you were referring in your testimony yesterday?

A. The tracks I am referring to it is hard to

(Testimony of Keith Ward.)

tell from this picture. The tracks I was referring to it is hard to [444] tell from this picture; it isn't very clear. The only tracks I believe I testified to was one set of tracks.

Q. Just one set of tracks?

A. Yes, to the north.

Q. Didn't you clearly state yesterday that you were testifying with reference to two sets of tracks? And Mr. Goppert asked you if there were three, Mr. Jameson asked you if there were three sets of tracks there, and you said that you knew that the vehicle had its front wheels turned and they were not locked because there was no third set of tracks?

A. When I say one set of tracks the set of tracks made by the dual wheels of the tractor.

Q. The one set means two tracks, is that correct?
A. One set.

Q. Set of tracks?
A. Tracks.

Q. Means two tracks?

A. Two parallel tracks close together made by the dual wheels of the tractor.

Q. Now there was no third set, there was no other track that showed the same general pattern down there?

A. Not that I could actually see to the vehicle.

Q. And from that you concluded that the front wheels were not locked and none of the brakes were locked on the vehicle, is that correct?

A. That is correct. [445]

Q. Now in what position would that vehicle go down the road in order to make those tracks? What

(Testimony of Keith Ward.)

was the general attitude of that vehicle, was it facing north and south or east and west to make the tracks you saw?

A. I wouldn't say it was facing either north or south or east and west; it was on an angle.

Q. About what angle?

A. The front end of the vehicle would be going southwest and the rear end of the vehicle would, of course, be pointed, the rear end would be pointing northeast.

Q. And the vehicle would be sliding in a generally southeasterly direction?

A. That is correct.

Q. At that time——

A. It was crossing the highway.

Q. It was crossing the highway. About how far would you say that the vehicle was in that general position sliding in that general position?

A. You mean how long were the tracks?

Q. Yes. How many feet approximately?

A. 150 feet.

Q. 150 feet. Now, if I understand your testimony, from the examination of the tracks your reconstruction of this accident places the vehicle that Hawkins was driving that the tractor with its nose end pointing southwest, its rear end pointing northeast and sliding sideways down the road [446] across the road from the west to the east and in a generally southerly direction?

A. It slid diagonally across the road.

Q. That is your testimony?

A. Just down at the last of the track it makes

(Testimony of Keith Ward.)

a slight curve to straighten up as shown in my diagram.

Q. Did you hear Mr. Hawkin's testimony yesterday? A. I believe I did, yes.

Q. Didn't Mr. Hawkins testify that as his vehicle came down the road it was pointed in generally a northerly and southerly direction? A. Yes.

Q. Just a little to the east? A. I did.

Q. Then your conclusion from this is that the vehicle was pointing in a manner other than that described by Mr. Hawkins?

A. That was my reconstruction of it from the tracks.

Q. And you are of the opinion Mr. Hawkins was misinforming the court when he said his vehicle was pointing in a generally southerly direction when he went down there?

Mr. Goppert: Objected to as argumentative.

The Court: Sustain the objection.

Q. If Mr. Hawkins' statement as to the position of his vehicle going down the road was correct, then do you have an opinion as to how those tracks were made?

Mr. Goppert: That is objected to as [447] being——

The Court: Sustain the objection as argumentative.

Mr. Lush: That is all.

Mr. Jameson: That is all.

Mr. Jameson: We have another table.

Mr. Haughey: If the court please, I understand the Plaintiff's counsel will stipulate with defend-

ant's counsel that Defendant's offered Exhibit No. 20 is a set of discounted tables which correctly show the present value of an annuity of \$1.00 per year for periods from 1 to 50 years and calculated at rates of interest from 4 to 8 per cent, with each one-half per cent between those two figures shown.

The Court: You stipulated?

Mr. Lush: Yes, we so stipulated.

Mr. Haughey: We offer in evidence Defendant's Exhibit No. 20.

The Court: All right, it may be received in evidence.

(Whereupon said Defendant's Exhibit No. 20, being annuity tables, offered and received in evidence, is a part of this record.)

Mr. Jameson: Defendant rests, if the court please.

The Court: Rebuttal?

Mr. Lush: Your Honor, we would like to read into the record a stipulation that was entered into between Plaintiff's and Defendant's counsel with respect to testimony of certain absent witness. [448]

Mr. Jameson: Now if the court please, defendant objects to the stipulation of other evidence in the stipulation, not because it is in the form of stipulation and not because the witness is not present in court testifying or deposition but for the reason it is our opinion it is improper rebuttal.

Mr. Lush: Your Honor, there are parts of the stipulation and the stipulation goes to the testimony of Taaffae, who was riding with Hawkins. It has been stipulated by the attorneys that either side

may read into the record any portion of these stipulations that they desire. Part of the statements of Taaffae go to direct contradiction of Hawkins' statement with reference to his application of the brakes and we would like to read that portion of the stipulation into the record.

The Court: Where does this come from; his statement from some deposition you took somewhere?

Mr. Lush: No, your Honor. He gave statements to Mr. Goppert and he gave a statement to me and we have stipulated that those statements or any portion of them we might care to submit to the court may be submitted to the court just as though Taaffae were here and sworn.

The Court: Your objection is——

Mr. Jameson: Not to the form.

The Court: Not being rebuttal?

Mr. Jameson: It should have been used in the case [449] in chief.

The Court: Very well, put it in the record.

Mr. Lush: It is hereby stipulated between the parties hereto that Richard Taaffae, if present in court, would testify as follows: I am 24 years of age. I started working for Fred M. Manning, Inc., in 1941. I was in the Service for three years and two months and then started back to work for the Manning Company again on January 15th, 1946. I was roughneck until lately when I got transferred to the transportation department, and worked at that for two days and got in this accident. I was the helper for Robert Hawkins, who was operating

Unit No. 314, an International West Coast Special with flat bed trailer. I know it was after two o'clock when we came to a corner about nine miles north of Worland where there is a bridge across a drain ditch. I noticed the bus coming down the road toward us on the other side of the bridge. I glanced at the bus and Mr. Hawkins stepped on the brake, the airbrake hooked to the truck and trailer. I was just sitting there loose, my feet propped up, and I kind of fell over toward the windshield when he put the brake on. Then I raised back up and just as I raised up I suppose that was just as the crash occurred. At any rate I got hit awful hard right over the eye. When he first hit the brakes I was sitting there with my feet up on the box, crossed. I fell over, I slid toward the front end. I was relaxed and leaning back with [450] my eyes closed trying to go to sleep when for some reason I sat up, probably because Hawkins put on the brake but I'm not sure. Just as I sat up the trailer swung over onto the west side of the road. As I remember it, the trailer never got back on its own side of the road, but I am not sure. I know that after Hawkins applied the brakes he did not release them, but held them on until the crash. Whether the brakes did not take hold on the trailer or whether they did not take evenly I do not know, but I do know that if the trailer brakes had worked and worked evenly, we would not have skidded as we did regardless of the icy condition of the road at that point. We crashed into the bus on the left side of the road. I do not know how fast we were going

at any point but when I first sat up I noticed the tachometer read 1200 RPMs. I don't think the bus or truck were going over 10 miles per hour at the moment of impact.

Mr. Jameson: Now, if the court please, if that portion of the stipulation, that portion of the evidence is received, then we would like the balance of the evidence read. Now it is agreeable to read it now or to save time here to leave the stipulation.

Mr. Lush: I have no objection to the entire stipulation going in.

Mr. Jameson: We still feel it is improper rebuttal but we feel that if part of it goes in that it ought all go in. [451]

The Court: Yes, had he asked to use the evidence at the time he was putting in his case in chief the court ordinarily would allow counsel to put in proof of that kind.

Mr. Jameson: That is correct.

The Court: It should have perhaps gone in in chief had he requested it. That is done even though counsel objects to it, and I suppose that is what counsel desired of the court to permit that proof to go in because it wasn't available to him to have used it in chief.

Mr. Lush: We believed, your Honor, that the witness was going to be the witness for the other side and that the other side would produce the deposition or the statements, your Honor.

Mr. Jameson: If the court please, both sides have had to stipulate for a long time and it wasn't a case of it being received at a late date.

Mr. Lush: There was no delay there being received at a late date, but we did not know what Hawkins would testify to in regard to application of the brakes and this is in direct contradiction to Hawkins' testimony as to whether he applied the brakes.

The Court: Yes, the whole statement should go in and not simply one part of it.

Mr. Lush: Your Honor, it was stipulated by the parties either attorney could read any part of it in the record and [452] the only point I wish to make by that is we do not wish to be bound by the remaining testimony of Mr. Taaffae other than that part we read.

The Court: If either party can read part of it, all of you can read all of it.

Mr. Jameson: That is right, your Honor.

The Court: Let it go in. Call your next witness.

GEORGE F. SINN

was called as a witness on rebuttal by plaintiff, and testified as follows:

Direct Examination

By Mr. Lush:

Q. Mr. Sinn, you have been sworn in this case and have given previous testimony in it, have you not? A. Yes, sir.

Q. And you have placed yourself at the scene of the accident within a short time after it happened? A. Yes, sir.

Q. Will you state whether or not the road imme-

(Testimony of George F. Sinn.)

diately south of the culvert is it rough or smooth?

A. Well, that stretch of the road is all smooth in there for half a mile.

Q. And did you observe any ice or accumulated snow or [453] anything of the sort that would cause roughness in the road at that point?

A. I did not.

Mr. Lush: You may cross-examine.

Cross-Examination

By Mr. Goppert:

A. Mr. Sinn, directing your attention to the driveway to the east north of the scene of the accident, isn't it usually rough along that area on that roadway?

A. No, that road in there has been shaded from both sides and the oil is in perfect condition.

Q. Isn't there gravel comes out on that highway from that driveway?

A. Oh, there could be some gravel out there occasionally.

Q. That causes an uneven condition there at that point the same as it does in front of the Lamb driveway a little farther north?

A. Not always. There may be at times that it could be, yes.

Mr. Goppert: That is all.

CONRAD BRILL

was called as a witness on rebuttal for plaintiff, and having been first duly sworn, testified as [454] follows:

Direct Examination

By Mr. Lush:

Q. Will you state your full name, please?

A. Conrad Brill.

Q. Where did you live with reference to the scene of the accident nine miles north of Worland?

A. At the time?

Q. Yes, at the time of the accident?

A. About twelve miles north of Worland.

Q. Then that would be about three miles north of the scene of the accident.

A. Approximately.

Q. Calling your attention to the date of the accident, December 27th, 1946, were you living there on that day?

A. At that place?

Q. Yes.

A. Yes, sir.

Q. And do you remember what the weather conditions were immediately before the time of the accident in the area of your home?

A. The wind was blowing a little.

Q. You may state whether or not it rained the night before or the morning before?

A. Yes.

Q. It had rained?

A. Yes.

Q. Did that rain later turn to snow?

A. Yes, sir.

Q. Did you drive from your home to the scene of the accident on that date?

A. I did. [455]

Q. And at about what time?

(Testimony of Conrad Brill.)

A. Oh, approximately three o'clock I left home I guess.

Q. And will you tell us the condition of the road from your home to the scene of the accident?

Mr. Goppert: This is objected to as being improper rebuttal. They went into this on their direct case.

Mr. Lush: Your Honor, we did submit some testimony in our case in chief with reference to that particular item but if the court will permit the answer to that question, we are through with the witness.

The Court: Well, I think perhaps the objection would be good but under the circumstances I will permit him to answer the question.

Q. (By Mr. Lush): What was the condition of this road from your home to the scene of the accident?

A. Well, as I remember it was slick that day.

Q. Slick? A. Yes.

Q. Was there ice on the road? A. Yes.

Mr. Goppert: That is objected to as being leading and suggestive.

Mr. Lush: That is all.

The Court: Any cross-examination.

Mr. Goppert: No cross.

Mr. Lush: Plaintiff rests, your Honor. [456]

Mr. Jameson: Defense rests.

The Court: Now, have you any more documents to put in the record.

Mr. Lush: No, your Honor.

Mr. Goppert: We have none, your Honor.

The Court: Now, this is quite a record, gentlemen, as you all know, and the court reporter has a lot of work to get out that precedes this case, so I can't tell you and he couldn't tell you just when he will have the transcript ready for you, but as soon as he can and upon receipt of the transcript you gentlemen will file your briefs. Plaintiff may take thirty days and the defense thirty days, and thirty days for reply if necessary. And in your briefs our local rule speaks of a succinct statement of the facts, and, of course, you know that simply means a brief and concise statement and not cover any more ground than you have to, and then follow that up with your argument and your authorities. I mean, of course, the statement of facts as the plaintiff sees them from his standpoint to sustain his pleadings and the statement of the facts as the defense sees it from their standpoint to sustain their answer and defense. I think that is all. Of course, if you should need any additional time in the preparation of your briefs because of other work and being busy or called away the court is usually rather liberal in the allowance of time so counsel may not be [457] crowded too much to give them a fair show. I think that is all.

Mr. Lush: Thank you, your Honor.

Mr. Goppert: I want to thank you, Judge.

(10:30 a.m.) [458]

United States of America,
State of Montana—ss.

I, Sidney O. Smith, do hereby certify that I am the Official Court Reporter in the above-entitled court, that the foregoing and annexed transcript constitutes a full, true and correct transcription of the proceedings had and the testimony taken, which was recorded in phonography and transcribed in longhand by me, in Civil Action No. 1043, Ernest B. Brownell, Plaintiff, vs. Fred M. Manning, Inc., et al., Defendant, at Billings, Montana, on May 16th, 17th, 18th and 19th, 1949.

Dated this 11th day of August, 1949.

/s/ SIDNEY O. SMITH,
Official Court Reporter. [459]

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD

United States of America,
District of Montana—ss.

I, H. H. Walker, Clerk of the United States District Court for the District of Montana, do hereby certify and return to The Honorable, The United States Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 460 pages, numbered consecutively from 1 to 460 inclusive, constitutes a full, true and correct transcript of all portions of the record in case number 1043, Ernest B. Brownell vs. Fred M. Manning, Inc., et al., designated by the parties as the record on appeal therein,

as appears from the original records and files of said Court in my custody as such Clerk.

I further certify that the costs of said transcript amount to the sum of Sixty-Two and 60/100ths (\$62.60) Dollars, and have been paid by the appellant.

Witness my hand and the seal of said Court at Great Falls, Montana, this 3rd day of March, A.D. 1951.

[Seal] H. H. WALKER,
Clerk, United States District Court for the District
of Montana.

By /s/ ELIZABETH C. McKEE,
Deputy Clerk.

[Endorsed]: Filed August 11, 1949. [460]

[Endorsed]: No. 12875. United States Court of Appeals for the Ninth Circuit. Ernest B. Brownell, Appellant, vs. Fred M. Manning, Inc., Appellee. Transcript of Record. Appeal from the United States District Court for the District of Montana.

Filed March 6, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court Court of Appeals
for the Ninth Circuit.

Findings of Fact and Conclusions of Law or for a new trial.

9. Notice of Appeal and Bond.

10. Points relied on by Plaintiff-Appellant for reversal.

Dated this 12th day of March, 1951.

/s/ ERNEST B. BROWNELL,
Appellant.

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McGINLEY,

/s/ SIDNEY S. FEINBERG,

/s/ THOMAS C. COLTON,

By /s/ THOMAS C. COLTON,
Attorneys for the Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed March 13, 1951.

United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 12875
CIVIL

ERNEST B. BROWNELL,

Appellant,

vs.

FRED M. MANNING, INC.,

Appellee.

Appeal from the United States District Court
for the District of Montana.

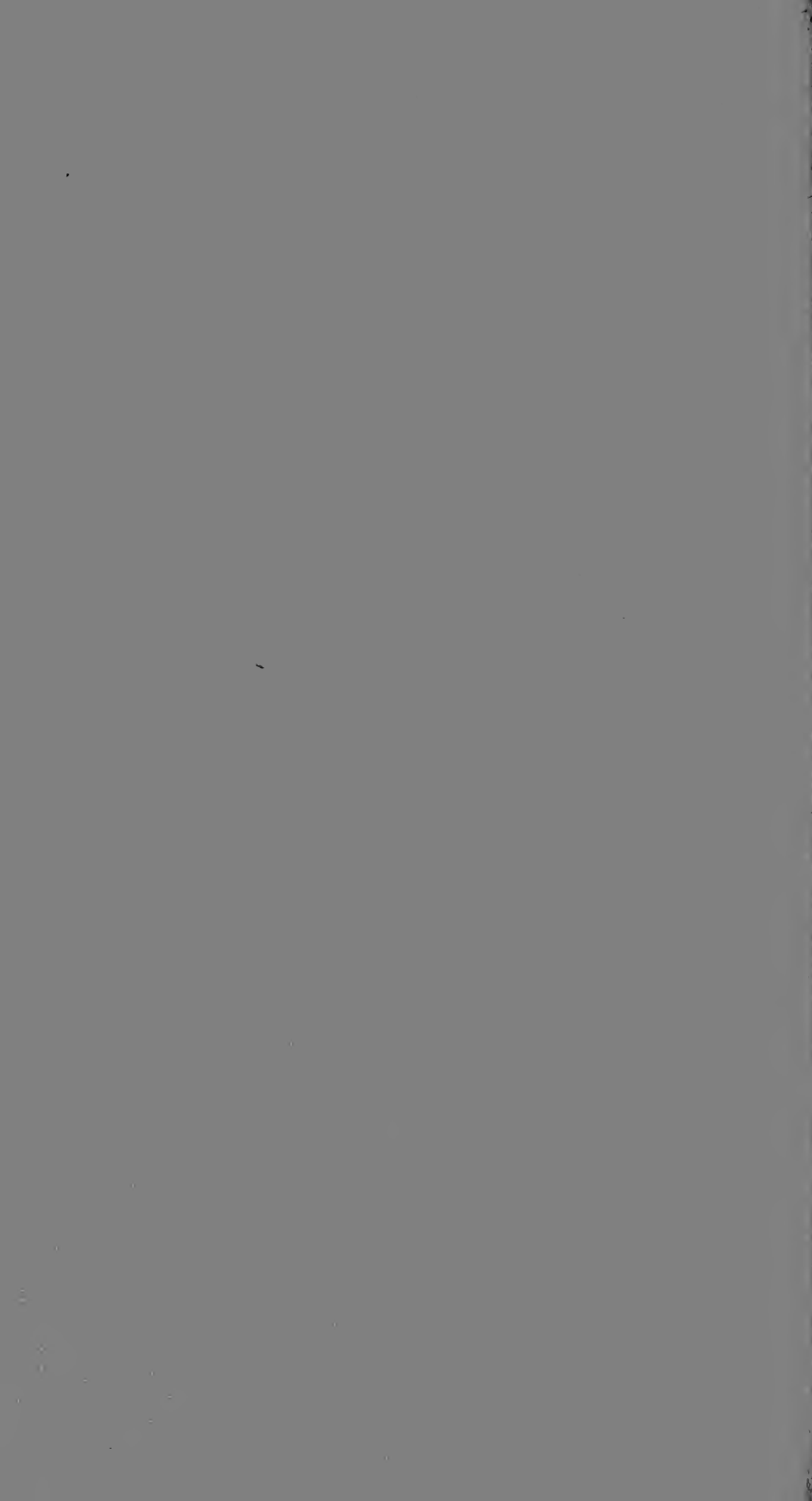
APPELLANT'S BRIEF

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STATEMENT OF THE CASE

This action was instituted in the District Court of Yellowstone County, Montana, by Ernest B. Brownell, who will be referred to in this brief as plaintiff, against Fred M. Manning, Inc., who will be referred to as defendant, and Robert B. Hawkins, to recover damages for personal injuries sustained by plaintiff in an accident which occurred on December 27, 1946, on United States Highway No. 20, approximately nine (9) miles north of Worland, Wyoming, involving a bus owned by the Burlington Transportation Company and operated by plain-

tiff as its employee and a truck and trailer of defendant operated by Hawkins as its employee.

No service of process was ever made upon Hawkins.

Plaintiff was a resident and citizen of Wyoming and defendant of Oklahoma and, based upon this diversity of citizenship, the amount of damages claimed exceeding the jurisdictional requirement, defendant removed the case to the United States District Court for the District of Montana.

The case was tried at Billings, Montana, before the Honorable Charles N. Pray, United States District Judge, without a jury, on May 16th to 19th, inclusive, 1949. On April 22, 1950, the trial court handed down an opinion (R. pp. 24-31) and, pursuant thereto, counsel for defendant prepared findings of fact and conclusions of law (R. pp. 31-37) which were filed May 1, 1950, and upon which judgment was entered the same date. Plaintiff promptly moved the court for an order amending the findings of fact and conclusions of law or for a new trial. Under date of December 15, 1950, the trial court denied plaintiff's motion and thereupon this appeal was taken from the judgment previously entered.

STATEMENT OF FACTS

There are certain facts in the case which are not in dispute. A most terrible accident occurred about 2:30 p. m. on December 27, 1946, at a point approximately nine (9) miles north of Worland, Wyoming, on United States Highway No. 20. United States Highway No. 20, at the scene of the accident, coursed in a general north and south direction. It was what is commonly known as an oiled highway, having an oil mat twenty-two (22) feet in width with two (2) feet of shoulder on each side. This road was crossed at approximately a right angle by

a drain ditch over which a wooden bridge with bannister had been constructed at a right angle to the roadway having a roadbed twenty-four (24) feet in width between the bannisters. A collision occurred on the easterly side of the highway at a point approximately ten (10) feet northerly of this bridge between a northbound Burlington bus, loaded with eighteen (18) passengers, driven by plaintiff, and a southbound International truck with semi-trailer attached of the defendant, driven by Robert B. Hawkins.

It is not disputed that from Worland, Wyoming, north to the scene of the accident, over the route taken by the Burlington bus, and for at least some distance north of the scene of the accident the highway was covered with ice and snow. It was contended by defendant that this condition of the highway extended only approximately four hundred and twenty-five (425) feet north of the bridge near which the accident took place to a point identified in the evidence as the irrigation lateral hump.

There is dispute in the evidence as to the speed of the respective vehicles immediately prior to the collision. It is not disputed that from the time plaintiff first observed the approaching vehicle the bus traveled a course down the highway along its own right side of the roadway and across the bridge, possibly turning slightly to the east immediately before the impact. Nor is it disputed that shortly before the impact, defendant's vehicle went into a skid which continued to the point of impact.

Evidence as to the position and movement of the respective vehicles as they approached each other will be important in the consideration of the questions to be presented to this Court. Plaintiff testified as follows: He first started to pay attention to the other vehicle when he was almost to the Sam Piel driveway (R. p. 57).

The center of the Sam Piel driveway is one hundred and sixty-five (165) feet south of the center of the drainage ditch (R. p. 50). The other vehicle was some forty (40) feet north of the Martin Lamb driveway when he first started to pay attention to it (R. p. 50). The center of the Martin Lamb driveway is two hundred and fifty (250) feet north of the center of the irrigation ditch (R. p. 60). His attention was particularly called to the other vehicle when he first started to pay attention to it when the trailer of the approaching vehicle jogged out into his lane of highway. He applied his brakes when he observed the trailer jogging out into the highway. The approaching vehicle then straightened back up on its side of the highway. The approaching vehicle then made another jog out into his side of the highway, almost straightened back up, and then went into another skid which continued to the point of impact (R. pp. 60-62).

Robert Hawkins, defendant's driver, testified as follows:

"Q. Can you locate with reference to any natural objects—withdraw that—did you see a bus coming from the south?

A. Yes, sir.

Q. And about what point had you reached when you first observed that bus?

A. As well as I can remember there was some trees on the right hand side of the road, which would be the west side, is about the first recollection that I remember; it might possibly have been two or three blocks from the bus.

Q. Do you remember a rise in the road?

A. Yes, sir.

Q. Was that in front of you when you first saw the bus?

A. As well as I remember I believe there was apparently around in there.

Q. And did you at that time come to any conclusion as to where you and the bus would meet?

A. Well, from a distance—

Q. I mean if neither of you changed your speeds?

A. From the distance that we were it looked to me like there was a good possibility of us meeting on this bridge.

Q. And what was the appearance of the bridge as you approached it then from the north?

A. Well, the bridge had a railing on it that set up around three feet and was covered with what apparently looked to me like snow and it looked narrow to me from when I first seen the bus approaching.

Q. Did it look like to you at that time it would be safe to pass that bus on that bridge?

A. No, it didn't.

Q. And did you observe at that time about what speed you were traveling?

A. I imagine I was traveling around 35 miles an hour.

Q. You weren't going your full limit?

A. No, sir.

Q. Did you estimate the bus coming at about the same speed?

A. Yes, sir, it looked to me like it was probably traveling about the same rate of speed.

Q. It appeared to be on its own side of the roadway, didn't it?

A. Yes.

Q. You observed that curve in the road between the two of you at that time?

A. Yes.

Q. And did you know at that time that there was ice under that snow that you observed on that bridge from the distance?

A. No.

Q. What did you do at that time when you decided if you kept on at the same speed you would meet and pass on the bridge?

A. I tried to stop.

Q. And when you say you tried to stop—I mean what did you do in the way of trying to stop?

A. I applied the brakes to my trailer.

Q. And by what means?

A. With the hand valve.

Q. Was that the one on the right hand side of the front steering wheel?

A. Yes, sir.

Q. Did you do it solidly or lightly?

A. No, I tried to check it gradually.

Q. And what happened?

A. Well, it seemed to me like it hit some rough snow or ice on the road and caused the trailer to slew to the east.

Q. And you were rolling forward at that same speed of 35 miles, possibly a little checked at that time?

A. Approximately that.

Q. And did you then attempt to use additional means of slaking up the speed on that vehicle and equipment that you were driving?

A. When I see I couldn't check it with these trailer brakes and the trailer was going to the east, I naturally turned the truck to the east to try to go with the skid and applied the foot brake.

Q. Now, that was the foot brake that applied the air on both the trailer and the tractor?

A. Yes, sir.

Q. And how did you apply that foot brake?

A. By applying it and releasing it.

Q. You mean with your foot?

A. Yes, sir.

Q. Then can you place approximately where you were on that highway when you applied that foot brake with reference to any natural objects along the highway?

A. It seemed to me like it was as well as I remember about where that driveway come out of that farm house.

Q. Which way, on the west side or the east side of the road?

A. On the west side.

Q. And then you started your vehicle toward the east as I understand it, your left, to follow the trailer?

A. That is right.

Q. And do you know what fanning brakes is?

A. Well, that is what I would call applying and releasing brakes, touching it on and off.

Q. Was that what you were doing?

A. Yes, sir.

Q. And did you continue to do that until the vehicle got over to the east side of the highway?

A. Yes, sir.

Q. Did you observe how far to the east side of the highway the equipment went?

A. As well as I remember, it went pretty well to the east side of the highway.

Q. Then what happened?

A. It seemed like it was straightened up, and when it seemed like that the truck had gotten pretty well in front of the trailer I tried to pull it out with power by applying my foot to the brake and giving it some gas to make it pull itself.

Q. And was that the last effort you made just before the collision?

A. About the last. It was coming out of it pretty well and started across the road to the right side.

Q. Was the bus coming toward you at the same time?

A. Yes, it was.

Q. You could see a collision was imminent, could you not?

A. Yes, sir.

Q. And about how fast was your vehicle going at the time of the final impact, if you have any idea?

A. I couldn't definitely state how fast it was going but it must have been down to at least ten miles an hour.

Q. You had actually slackened it considerable, had you not?

A. Yes, sir.

Q. Did you know before putting on your brake on your trailer the first time back to the north that there was ice on that road?

A. No, sir.

Q. You had seen some snow up there on the bridge, hadn't you?

A. Yes, sir.

Q. And as you went along you observed more snow and more ice all the time, didn't you?

A. Yes, sir" (R. pp. 362-367).

On cross examination, Hawkins testified further to the following effect: He was right along by the irrigation lateral (four hundred and twenty-five (425) feet north of the bridge) when he first recalled seeing the approaching bus about possibly three (3) blocks away (R. pp. 374-375). He was at the irrigation lateral when he first noticed snow on the bridge, and he reached the snow about half way between the irrigation lateral and the bridge (R. pp. 377-378). He first skidded somewhere along the trees which started at the irrigation lateral. He was not out of control when he first skidded (R. p. 384). The trailer went into a swerve before the tractor did (R. p. 385). To the best of his recollection, when he first started sliding, the bus was approaching the south side of the bridge (R. p. 388).

There is one further fact, if it may be referred to as such, which is of particular import. Just prior to the trial of this case, there was tried before the same Court, also without a jury, the so-called Hennessey cases in which recovery was sought against both Fred M. Manning, Inc., and the Burlington Transportation Company for damages arising out of the death of two of the passengers riding in the bus.

CLAIMS OF THE PARTIES BELOW

It was contended by plaintiff that the skidding of defendant's vehicle was occasioned by the negligence of defendant's driver in the operation of such vehicle and that the consequent presence of defendant's vehicle on its wrong side of the highway was the sole proximate cause of the collision.

Defendant contended first that its driver was guilty of no negligence and that the collision was an unavoidable accident and further that the plaintiff was himself guilty of contributory negligence.

TRIAL COURT'S DECISION

The trial court rejected a contention of defendant that there was a sudden, abrupt and unforeseen change from clear dry blacktop to snow and ice at the irrigation lateral some four hundred and twenty-five (425) feet north of the bridge and, in effect, held that the defendant could not invoke the doctrine of unavoidable accident with respect to the presence of its vehicle on the wrong side of the highway.

The trial court went on to hold that plaintiff knew the condition of the highway for a distance of nine (9) miles south of the bridge; that in view of the condition of the highway, he was traveling at an excessive speed; that he must have seen the possible danger of a meeting on the bridge, especially when he observed the trouble the driver was having with his truck and trailer; that he should have come to a full stop before crossing the bridge; that the plaintiff himself was guilty of negligence which proximately contributed to the cause of the accident.

QUESTIONS FOR REVIEW

1. Was the plaintiff guilty of negligence?
2. If there was negligence on the part of the plaintiff, was such negligence a proximate cause of the collision?

SPECIFICATION OF ERRORS

It is the claim of plaintiff on this appeal that the trial court erred in the following particulars:

1. In finding the plaintiff guilty of negligence.
2. In finding that any negligence on the part of the plaintiff was a proximate cause of the collision.
3. In denying plaintiff's motion for amended findings or for a new trial.

ARGUMENT

With all due respect to the learned trial court, it conclusively appears from his opinion deciding the case that he erroneously applied the wrong legal standards to the conduct of plaintiff in reaching the conclusion that such conduct constituted negligence and that it proximately contributed to cause the accident.

Since the accident took place in the state of Wyoming, reference will be made to the law of that state wherever possible.

Defendant's Negligence.

We have pointed out above that the trial court rejected the contention of defendant that the collision was an unavoidable accident. This was based upon the established weight of authority, followed in the case of *Wallis v. Nauman*, 157 Pac. (2d) 285, in which the Supreme Court of Wyoming said:

"The law relative to a skidding automobile which leaves its right side of the road and passes over the center of the highway into the traffic lane legally reserved for vehicles moving in the opposite direction is well expressed by the authorities now to be cited.

"In *DeAntonio v. New Haven Dairy Co.*, 105 Conn. 663, 136 Atl. 567, 570, the court said: 'Failure to

keep to the right when, through no fault of the driver, an automobile skids on a slippery pavement and is thus thrown across the road, has been held to excuse failure to comply with the statute. *Chase v. Tingdale (Bros.)*, 127 Minn. 401, 149 N. W. 654; *Huddy on Automobiles* (7th Ed.) 333; *Berry on Automobiles*, 865. But, if such skidding results from negligent acts or omissions of the driver, he is not absolved from the consequences of breach of the rule, although it is not deliberate or intentional.'

* * * * *

"So in *Hunt v. Whitlock's Adm'r*, 259 Ky. 286, 82 S. W. (2d) 364, 366, the court uses this language: 'The failure of the driver of a motor vehicle to keep to the right side of the center of a highway is excused where, without fault on his part, the vehicle skids across the center line; but, where its skidding results from his negligence, the doctrine of "unavoidable accident" may not be invoked to exempt liability for the consequences. *Consolidated Coach Corporation v. Hopkins' Adm'r*, 238 Ky. 136, 37 S. W. (2d) 1. It is likewise true that the skidding itself is not ordinarily evidence of negligence, where it skids across the center line of the road to the left side thereof and collides with another; *but the burden is upon the driver on the wrong side of the road to excuse or justify the violation of the law of the road. Berry on Automobiles* (4th Ed.); 1 *Blashfield, Encycl. of Automobiles*, page 414; *Chase v. Tingdale Bros.*, 127 Minn. 401, 149 N. W. 654; *Peterson v. Pallis*, 103 Wash. 180, 173 Pac. 1021; *Thomas v. Adams*, 174 Wash. 118, 24 Pac. (2d) 432; *Wilson v. Congdon*, 179 Wash. 400, 37 Pac. (2d) 892; *Leonard v. Hey*, 269 Mich. 491, 257 N. W. 733; *Johnson v. Freemont Canning Co.*, 270 Mich. 524, 259 N. W. 660.'

"Both 2 *Blashfield, Cyc. of Automobile Law*, Perm. Ed., Sec. 916, p. 58, and 3-4 *Huddy, Cyc. of Automobile Law*, Sec. 109, p. 176, announce the rule that *skidding to the left side of the road cannot be excused 'if the skidding is due to the negligent acts or omissions of the motorist.'*" (Italics supplied.)

PLAINTIFF'S CONDUCT

We have suggested that the trial court erroneously applied the wrong legal standards to the conduct of plaintiff.

In cases tried to a jury, after its verdict is returned, it becomes necessary to determine whether there is evidence to support the verdict and whether the jury was instructed properly as to the applicable law. In very few of such cases is there any other basis upon which the propriety of the verdict can be tested. If in any such case it should appear that the deliberations of the jury were had under improper or erroneous instructions as to the applicable law, the verdict is set aside and the case is resubmitted to another jury for determination.

In many cases tried to a court without a jury, the only basis upon which the decision of the court can be tested is whether there is evidence to support such decision. In such cases it is impossible to read the mind of the trial court to ascertain the legal principles applied by him in determining the questions of fact. However, if it affirmatively appears that the court applied erroneous legal principles in arriving at his decision, we respectfully submit that such decision must be set aside and the case resubmitted for decision in accordance with proper applicable law.

We have referred to the fact that the trial court only the week previous to the trial of this case had tried without a jury certain actions arising out of the death of passengers in the bus, which actions were against both the Burlington Transportation Company and Fred M. Manning, Inc., in which cases the Court found in favor of plaintiff against both defendants.

While Brownell in the operation of the bus was not an insurer of the safety of his passengers, the law imposed

upon him a duty to exercise greater care for their safety than he owed to the public generally and to the defendant specifically. See *Horsley v. Robinson* (Utah), 186 Pac. (2d) 592. It must be a certainty that counsel for plaintiffs in the so-called Hennessey cases predicated the liability of the Burlington Transportation Company on Brownell's violation of this duty to exercise a higher degree of care.

We believe there are clear indications in the opinion of the trial court (R. pp. 24-31) that Brownell was being held, conciously or otherwise, to the same duty to exercise a higher degree of care than the law imposed upon him as to the defendant. We quote the following excerpts from the opinion:

"The bus carried eighteen passengers who were entrusted to the care of the plaintiff, who was the driver in charge. * * * The driver of the bus knew the conditions and had known them for a distance of nine miles south of the bridge and also that care and caution would be required *to insure the safety of his passengers* * * *." (Italics supplied.)

Let us examine the specific findings of fact made by the trial court to determine whether the same were arrived at upon the application of the proper legal standard of conduct applicable to the plaintiff in this case.

The Court found that plaintiff was driving at an excessive rate of speed in view of the slippery condition of the highway. Without in any way conceding the correctness of this finding, we shall defer further discussion of the same until we reach the question of proximate cause.

The Court found that plaintiff could see the danger ahead when the vehicles were eight hundred and fifty (850) to one thousand (1000) feet apart and should have slowed down and stopped before colliding with the on-

coming truck. In the first place, there is no evidence to justify the distance of eight hundred and fifty (850) feet to one thousand (1000) feet set forth by the Court. The evidence of Hawkins was to the effect that he did not see the approaching bus until he (Hawkins) got over the rise in the road at the irrigation lateral four hundred and twenty-five (425) feet north of the bridge. Since the accident occurred some ten (10) feet north of the bridge, the truck traveled a distance of at the most four hundred and fifteen (415) feet after the bus came in view. Without discussing the conflicting evidence as to the particular speed at which each vehicle was being driven, we submit that there was no evidence which would justify a finding that the bus was being operated at a speed greater than that of the truck. This means, and even assuming that the speed of the bus was at all times as high as that of the truck, that when the respective vehicles first came into view of each other they were at the most eight hundred and thirty (830) feet apart. But there was nothing at that moment which indicated to either driver that there was danger ahead.

Hawkins did testify that when he first saw the bus it appeared to him like there was a good possibility of meeting on the bridge and that it looked to him at that time that it would not be safe to pass the bus on the bridge (R. p. 363). On cross examination, he admitted familiarity with the system of highway markers used in Wyoming and that signs were put out to warn of narrow bridges; that he didn't remember seeing any such sign at the approach of this bridge and that actually this bridge could not be classed as a narrow bridge (R. p. 382). In view of the admitted physical facts that the bridge was two (2) feet wider than the blacktop, the suggestion of Hawkins that he anticipated a danger

which did not in fact exist can not be translated into a finding of fact that Brownell must have seen a possible danger of a meeting on the bridge.

The first possible indication of any danger was when the truck skidded. Plaintiff testified that the first skid of the truck took place when the truck was some forty (40) feet north of the Martin Lamb driveway. This was approximately two hundred and ninety (290) feet north of the center of the bridge. Having in mind that the bridge was twenty (20) feet in length and that the collision took place ten (10) feet north of the bridge, and again assuming an equal speed of the respective vehicles, they were at most five hundred and forty (540) feet apart. The location of this first skid by defendant's vehicle is corroborated, we believe, by the testimony of Hawkins, in spite of his inability to place his exact position at that point (R. p. 385).

But there was still no indication of danger. Plaintiff did not realize that Hawkins would thereafter lose control of his truck. Even Hawkins conceded that when he first skidded he was not out of control (R. p. 384).

And so, at some point when the vehicles were less than five hundred and forty (540) feet apart, and without attempting to fix the exact distance, Hawkins lost control of his vehicle and Brownell either became aware of the danger or, under the law, should have become cognizant thereof.

Then it became the legal obligation of Brownell to exercise reasonable care to avoid the danger. But it can not be denied that the danger was created solely by the uncontrolled presence of defendant's vehicle on the wrong side of the highway. Nor can it be denied that an emergency was created thereby. Obviously, in reaching a determination as to whether Brownell then exercised

reasonable care, he was entitled to the benefit of the so-called emergency rule. We respectfully submit that it is clear that the trial court did not consider Brownell entitled to the application of that rule. If this case had been tried to a jury, it would have been error for the trial court to refuse to instruct the jury on the basis of the emergency rule. Similarly, we submit that if the trial court determined this case without reference to such rule, its decision can not be permitted to stand.

Excepting for the moment the question of speed, and, conceding that applying the standard of care which Brownell owed to his passengers his conduct might have constituted negligence as to them which proximately contributed to cause the accident, we submit that there was no violation of his legal duty to the defendant to exercise reasonable care to avoid the collision.

Proximate Cause.

Even conceding that plaintiff was driving at an excessive speed in view of the condition of the highway, and that this constituted negligence, such negligence was not a proximate cause of the accident.

It is elementary that "the violation of a legal duty by a driver on the highway does not necessarily carry with it liability for an injury caused by his car, as to incur such liability the violation must have been the proximate cause of the injury concerning which complaint is made." *Hester v. Coliseum Motor Co.* (Wyo.), 285 Pac. 781. See also *Christensen v. McCann* (Wyo.), 282 Pac. 1061.

"That an automobile was going at an unlawful or excessive speed, in violation of either common law rules or a statute or ordinance, at the time of a collision does not constitute a ground of liability for

injuries inflicted, or bar recovery for injuries sustained in the collision; if such violation was not a proximate cause of the accident."

Blashfield, Cyclopedia of Automobile Law and Practice, Vol. 4, part 2, 2611.

The foregoing rule of law was adopted by the Supreme Court of Wyoming in the case of *O'Mally v. Eagan*, 43 Wyo. 233, 2 Pac. (2d) 1063, 77 A. L. R. 582, rehearing denied 43 Wyo. 350, 5 Pac. (2d) 276. In this case, the plaintiff was a passenger in an automobile which, while on the wrong side of the highway, collided with an on-coming automobile. Plaintiff brought suit against both drivers. The driver of the automobile in which plaintiff was riding as a passenger entered a special appearance on account of want of proper service of summons and the case proceeded to trial against only the other defendant whose automobile was on the proper side of the highway at the time of the collision. The jury returned a verdict in favor of plaintiff in the sum of seven thousand, seven hundred dollars (\$7,700.00), but the court entered a judgment notwithstanding the verdict, from which judgment plaintiff appealed. We shall not burden this brief with any lengthy quotations from the opinion of the Supreme Court of Wyoming, but we respectfully submit that the language used therein is equally applicable to the case at bar and that the legal principles there enunciated and applied are equally determinative here.

We also call the Court's attention to the annotation in 77 A. L. R. 598, and, particularly, the cases therein referred to involving a car speeding when other vehicle on wrong side of highway.

So that the position of plaintiff on this appeal may be clearly understood, without conceding that any conduct on his part constituted negligence, it is contended that

as a matter of law the sole proximate cause of the collision was the presence of defendant's vehicle upon the wrong side of the highway. Nor can there be any doubt as to the correctness of that portion of the trial court's decision that such presence on the wrong side of the highway can not be explained away on the theory of unavoidable accident.

Justice Requires New Trial.

It shall be contended that the case should be remanded with instructions to the trial court to amend the findings of fact by adding a finding that the negligence of defendant was the sole proximate cause of the collision, by adding a finding as to plaintiff's damages and by amending the findings of fact and conclusions of law accordingly.

In any event, if the foregoing contention is not granted, there should be a new trial of all issues.

The printed transcript of record is quite lengthy and the only evidence omitted is that pertaining to plaintiff's injuries and damages. It may be suggested that other evidence which was printed is in the nature of surplusage. This was deemed necessary to avoid any possible suggestion that evidence was omitted intentionally by the appellant and then perhaps accidentally by respondent, which would justify the result reached by the trial court. We earnestly contend that an examination of the entire record, having in mind the correct applicable principles of law, must lead to the conclusion that the decision of the trial court was not a fair, just and proper result.

The trial court itself voiced uncertainty as to the correctness of his decision.

“After hearing the testimony of physicians and surgeons in respect to their services in behalf of the plaintiff there can be no question that he was severely injured in the collision, that the driver of the truck and trailer was also injured and thereafter hospitalized, and, further, that several passengers in the bus lost their lives in the accident, all of which is to be deeply regretted, but these lamentable facts do not relieve the Judge of his serious duty to determine the responsibility for this tragic occurrence by resolving the evidence and attending circumstances to the best of his judgment and ability, *and for any error committed the learned members of the higher tribunal will readily find and apply the correct solution*” (R. p. 29).

“As was stated in the ruling on the motions for new trial in the Hennessey cases, relating to the same accident, the court has been unable to find any new matter of sufficient importance to cast doubt on the correctness of the decision, findings and conclusions heretofore rendered in said cause. *Whether the court is correct in so holding will not be known until a review can be had by higher authority.* As the court understands the facts and law deemed applicable, to grant a new trial would unnecessarily delay proceedings and postpone to an unreasonable extent the final outcome of the case” (R. p. 42). (Italics supplied.)

What could possibly have been the nature and basis of the Court's expressed uncertainty? The Court must be presumed to have had full knowledge of the well established rules applicable to appeals to the Circuit Court of Appeals. These rules have been set forth in numerous cases, and we assume counsel for defendant, in its effort to sustain the lower court decision, will cite specific cases to the following effect:

“A finding of fact by the court sitting without a jury is equivalent to a verdict, and hence will be disturbed only when it is clearly erroneous, or shows

that the judge was influenced by improper motives, or misunderstood the evidence.

“Findings of trial court on questions of fact, unless manifestly erroneous, will be affirmed.

“A finding by the trial court will not be disturbed by the court on appeal, when there is *any* evidence to support it.” (*Italics supplied.*)

What did the trial court mean when it said that “to grant a new trial would unnecessarily delay proceedings and postpone to an unreasonable extent the final outcome of the case?” The Court must have appreciated the fact that if the Appellate Court ordered a new trial the postponement of the final outcome of the case would be much further delayed by the time required for appeal.

We submit that the trial court must have realized that there was doubt as to the propriety of the legal principles applied by the Court to the evidence in reaching its decision, and we believe it has been fully demonstrated that in this respect the doubt of the Court was justified.

CONCLUSION

We agree with the trial court that the final outcome of this case should not be postponed further unreasonably. The presence of the defendant's vehicle on the wrong side of the highway can not be explained away on the theory of unavoidable accident but was the result of defendant's negligence and was the sole proximate cause of the accident. The case should be remanded with appropriate instructions to the trial court for such further proceedings as may be necessary to grant to plaintiff the damages sustained by him.

In any event, in the interest of justice, there must be at the very least a new trial as to all issues so that plaintiff may have a proper appraisal of the evidence and de-

termination of the facts governed by correct legal principles.

Respectfully submitted,

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United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 12875
Civil

ERNEST B. BROWNELL,
Appellant,

vs.

FRED M. MANNING, INC.,
Appellee.

Appeal from the United States District Court
for the District of Montana

APPELLEE'S BRIEF

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STATEMENT OF THE CASE

This appeal presents two related questions:

(1) Is there evidence to support the court's findings that plaintiff was guilty of negligence in any or all of the particulars specified in the decision and the findings?

(2) If so, was such negligence a proximate cause of the collision?

The analysis of the evidence in Appellant's Brief, in support of counsel's contention that the court erred in its findings, is very meager. They rely primarily upon (1) their contention that the court applied the "wrong legal standards to the conduct of plaintiff" (App. Brief p. 12), inferring that the court may have confused this case with the so-called Hennessy cases; and (2) their suggestion of doubt in the mind of the trial court with respect to the correctness of his decision. These contentions and

inferences were not included in either the Points Relied On For Reversal (R. p. 45) or the Specifications of Error (App. Brief p. 10). Nevertheless we shall discuss them later in this brief.

STATEMENT OF FACTS

The Statement of Facts in Appellant's Brief is substantially correct although incomplete. In our argument we shall refer in detail to those facts which sustain the court's findings.

We question specifically two statements in appellant's Statement of Facts:

(1) Appellant states that "the other vehicle was some forty feet north of the Martin Lamb driveway when he (plaintiff) first started to pay attention to it." (App. Brief p. 4). Instead the defendant's truck was at the irrigation lateral, 425 feet from the bridge, when the plaintiff first paid particular attention to it. The following is taken from plaintiff's testimony:

"Mr. Lush: We have stipulated it is approximately 425 feet from the north edge of the bridge to the high point of the road which was the irrigation lateral, your Honor.

"The Court: Where he first noticed the approaching vehicle.

"Mr. Lush: Where he first paid particular attention to it, your Honor, yes.

"Q. When you first observed the vehicle approaching from the other direction when you first started to pay attention to it what called your attention particularly to it?

"A. His trailer jogging out into the highway into my lane of highway.

"Q. And when you observed the trailer jogging out into the highway, I believe you said, what did you do?

"A. I applied the brakes at that time." (R. pp. 60-61).

(2) The final paragraph of the statement referring to the so-called Hennessy cases is not properly included in the Statement of Facts.

ARGUMENT

FACTS SHOWING NEGLIGENCE OF PLAINTIFF

Four eye-witnesses testified at the trial, —the plaintiff, Brownell, defendant's driver, Hawkins, and two passengers in plaintiff's bus, Whiston and Dees. Plaintiff relied primarily upon their testimony to establish negligence on the part of Hawkins. The same testimony, together with the evidence of the icy condition of the highway, sustains the court's findings that plaintiff was also negligent. We shall summarize and discuss briefly the evidence which, when considered as a whole, not only supports the findings of the trial court, but permits no other conclusion than that plaintiff was guilty of negligence which was a proximate cause of the collision.

1. Plaintiff Drove Nine Miles Over Dangerous, Icy Highway to Point of Collision.

The court found "that the roadway was covered with snow and ice all the way north from Worland to the bridge and beyond; that both drivers knew there was snow and ice and slippery conditions underneath their vehicles; and that plaintiff had known these conditions for a distance of nine miles south of the bridge." (Finding V. R. p. 3). Does the testimony sustain this finding?

The plaintiff himself testified that "it was ice with snow on top" (R. p. 86); and that the road was very icy and very slick from Worland clear up to the scene of the accident (R. p. 88). The County Sheriff, John S. Nicola, testified the road condition coming north from Worland was "very slippery" (R. p. 117); he came near to piling up two or three times enroute from Worland to the scene of the accident; he had skidded (R. p.

156). The road was "sort of corrugated." (R. p. 157). When he skidded he made a side motion of three or four feet. In some portions of the road the snow was packed three inches deep (R. p. 157). Mr. Whiston, another passenger in the bus, testified that it was pretty solid ice (R. p. 192). Martin Lamb stated "It was very slippery" (R. p. 223); that he did not think he traveled over twenty or twenty-five miles an hour approaching the scene of the accident from the south (the route over which plaintiff had traveled); and that he didn't measure or pace the distances at the scene of the accident on the day of the accident because it was so slick on the roadway at that place (R. p. 223).

Fred Wickam, a State Highway Patrolman, testified that he drove from five miles south of Thermopolis to the scene of the accident after being notified by radio of the happening. He found ice from a point just south of Worland to the scene of the accident. He stated "Well, I would call it solid ice across the road." (R. p. 266).

Keith Ward, a State Highway Patrolman, who came from Basin to the accident and then went to Worland after the accident, described the roadway from the scene of the accident to Worland as: "Well, there was hard packed snow from the scene of the accident right through into Worland. It was hard packed snow and it was rough and slippery and dangerous road to travel, especially with an outfit like I had." (R. p. 402). He was driving a panel truck and stated that he travelled that road at a speed of from twenty-five to thirty miles per hour because of the road conditions (R. p. 402). This testimony was corroborated substantially by Dr. R. B. Walker (R. p. 295), O. R. Booker (R. p. 305) and A. J. Prosser (R. p. 341).

The evidence of all of the witnesses for both plaintiff and defendant concur that the road between Worland and the scene of the accident was coated with ice covered by packed snow up to three inches thick, which was rough, slippery and bumpy. Its condition was such as to warn travellers thereon, at least all of the distance from Worland to the scene of the accident, that they must drive slowly and be prepared to avoid skids, not only of their own vehicles, but also of any approaching vehicles.

2. Drivers Could See Danger Ahead When Vehicles Were 850 Feet to 1000 Feet Apart and Equi-Distant from Narrow Appearing Bridge.

Counsel for appellant question the court's finding that both drivers could see the danger ahead when 850 to 1000 feet apart and should have slowed down and stopped before colliding with each other. They argue that "when the respective vehicles first came into view of each other they were at the most 830 feet apart" and that there "was nothing at that moment which indicated to either driver that there was danger ahead." (App. Brief pp. 13-14). They arrive at 830 feet as the maximum distance by taking the distance from the rise in the road at the irrigation lateral to the bridge, 425 feet, deducting therefrom ten feet from the bridge to the point of collision, and assuming that the bus was equi-distant from that point when the drivers first came into view of each other. They disregard the testimony which shows that for even a greater distance plaintiff could have discerned the danger, had he maintained a proper lookout.

It is conceded that the irrigation lateral was approximately 425 feet from the north end of the bridge. The plaintiff Brownell testified that he "first paid particular attention to the truck" at that point and that the trailer of the truck there jogged "out

into the highway into my lane of travel.” (R. pp. 60-61). He also testified that he could see clearly for one-half mile (R. p. 92).

Hawkins testified that he was possibly three blocks from the bus when he first saw it; that he was along by the first trees at the irrigation lateral; and that he did not “recall” seeing the bus before that (R. pp. 374-5).

On cross-examination plaintiff’s counsel developed the fact that Hawkins’ eyes would be some seven or eight feet above the pavement when he was sitting in the cab, (R. pp. 376-7) and interrogated Hawkins further as follows:

“Q. How high is that rise?

“A. I couldn’t say. I know there is a rise there in the road.

“Q. Are you familiar with maps? If this map represents one foot of rise here, that is one foot rise for each one of those little blocks, then from the lowest point back here to the top of that rise we actually have only slightly over four feet, isn’t that true? Doesn’t the map show just slightly over four foot rise between this spot back here and the high point there?

“A. I don’t know as to that, what the height would be.

“Q. Well this is drawn to scale, is it not? This scale is one inch equals ten feet on a horizontal, and these all represent one foot. So the lowest point on the road back here visible on this map was not as low as the height your head was above the pavement, was it, if your head was seven feet above the pavement?

“A. I don’t know.

“Q. From the low point visible on this map you could always look over the top of that hill and see the road ahead, could you not? Well isn’t that the true fact with reference to the road—never mind the map—couldn’t you always see ahead over the top of that hill and see the road and the character of the road ahead of you? There isn’t any place visible on this map you couldn’t have looked ahead of you and seen the road was covered with snow there over the top of that hump?

“A. I could see the road was covered with snow the other side of the bridge.” (R. pp. 379-80).

Counsel's questions effectively suggest that both drivers could, if keeping a proper lookout, see the other vehicle for a greater distance than the 415 feet from the lateral to the point of collision; and the court called attention in its decision to the fact that "the heads of both drivers were at an elevation of about seven feet above the roadway so that each had a clear and unobstructed view." (R. p. 24). Moreover, the court could well find that at the point of impact the plaintiff's bus was traveling faster than the defendant's truck.

Whiston testified three different times that the two vehicles were about equi-distant from the bridge (R. pp. 194, 198).

Dees admitted that he had testified in a prior deposition that it looked like the two vehicles might pass on the bridge if he (Hawkins) had kept coming, (R. p. 237) and that if Hawkins hadn't slowed down they would have passed on the bridge.

Wickam, the highway patrolman, testified that on the evening of the accident plaintiff made the statement that he was trying to slow down because he didn't want to meet the truck on the bridge (R. p. 267). This is confirmed by the written report of the two highway patrolmen, sheriff and under-sheriff from their combined investigation (Pl. Ex. 10, Deft. Ex. 18, R. pp. 404, 406).

Since the distance from the lateral to the north end of the bridge was 425 feet and the bridge was twenty feet long, the distance between the two vehicles would be at least 850 feet if they were equi-distant from the bridge and neither driver had sighted the other until the truck reached the lateral. It is clear, however, from the foregoing evidence that the court could properly find that each driver could see the other before the truck reached the lateral.

The court found "that both drivers were admittedly aware that they should avoid a meeting on the bridge, which appeared to be narrow because of a slight angle with the roadway." (Finding VII, R. p. 33).

Keith Ward, the highway patrolman, described the bridge as follows:

"A. Well it has the impression of a narrow bridge due to the fact there's a turn slightly and the road coming south goes straight up approximately to the bridge. The bridge sets slightly with the north end to the east. It has the look of a narrow bridge due to being set at an angle to the highway." (R. pp. 408-09).

Hawkins testified to the same effect (R. p. 363. See also Exhibit 9).

All of the testimony leads inescapably to the court's findings that "both drivers had a clear and unobstructed view of each other as they approached the bridge"; that "the thought that they might pass each other at or on the bridge was in the minds of both drivers"; that "both drivers could see the danger ahead when 850 to 1000 feet apart, and both should have slowed down and stopped before colliding with each other." (Findings IV and VI, R. p. 33).

3. Plaintiff Must Have Seen Threatening Situation and Possible Danger of Meeting on Bridge.

(a) Plaintiff's Observation of Skids or Jogs of Defendant's Truck.

The contention of appellant's counsel that the "first possible indication of any danger was when the truck skidded" (App. Brief p. 15) ignores the icy and dangerous condition of the highway, plaintiff's speed on that icy road, and the fact that both drivers anticipated a meeting on the bridge. Moreover,

counsel are mistaken in placing the point of the first skid at 40 feet north of the Martin Lamb driveway. It is clear from plaintiff's own testimony that this occurred when the truck was at the irrigation lateral, 425 feet from the bridge (R. pp. 60-61). Plaintiff testified that the second jog was about at the Martin Lamb driveway (250 feet from the center of the bridge).

From Brownell's direct examination:

"Q. And will you point out to the court at approximately at what spot it made the second jog out into the highway?

"A. I would say about at the Lamb driveway.

"Q. And what was the next move that was made by the approaching vehicle?

"A. It straightened back up almost and then went into another jog and it never came out of it.

"The Court: Went into another what?

"Maybe I should say skid, your Honor.

"Q. (By Mr. Lush): And was that the third skid that you observed that vehicle making?

"A. Yes." (R. pp. 61-62).

The plaintiff further testified that he realized the truck was "completely out of control" when it was about 200 feet north of the bridge (R. p. 68).

(b) Distances From Bridge and Point of Impact.

It is true, as set forth in appellant's statement of facts, that plaintiff testified that he first started to pay attention to the other vehicle when he was almost to the Sam Piel driveway (R. p. 57) and that the center of this driveway is 165 feet south of the center of the bridge. This testimony and like testimony of others of plaintiff's witnesses is inconsistent with prior testimony of the same witnesses and with the physical facts. Plaintiff has also testified that when he first paid attention to the truck, it was at the irrigation lateral, 425 feet from the north edge

of the bridge (R. p. 60-61). If both of these estimates were correct, the truck was 415 feet from the point of impact and the bus 185 feet. In order to collide where they did, the truck would have had to travel over twice the distance of the bus, although the two vehicles were traveling at approximately the same speed when the drivers came into sight of each other. This is manifestly impossible.

Moreover, plaintiff's counsel overlooked in this connection a very significant bit of testimony of plaintiff himself. While it is true he testified at the trial that he was at the Piel driveway when the truck was at the lateral and made its first swerve, he also testified that after the first swerve he could have pulled off at the Piel driveway had he known the truck was going to get out of control (R. pp. 67-8). Obviously he must have been some distance south of the Piel driveway when he observed this swerve, which occurred near the irrigation lateral, if, as he admits himself, he could have turned into the Piel driveway after observing the swerve.

Equally implausible is plaintiff's testimony that when he observed the truck out of control 200 feet north of the bridge, his bus was 10 or 15 feet south of the bridge (R. p. 68). If this were true, then the truck skidded a distance of over 200 feet while the bus traveled 40 to 45 feet at a speed estimated by plaintiff and his own witnesses at 15 to 25 miles an hour. (See page 14 of this brief). If plaintiff's estimates of distance and speed are correct, the truck would have been skidding 60 to 100 miles per hour.

Plaintiff's testimony on this point at a prior deposition is more plausible and coincides more fully with the true facts. He then testified that when he was approximately 200 feet south

of the bridge, the two vehicles were 400 to 450 feet apart (R. p. 93). The actual estimates of distances are not too important. Errors in such estimates are easily understandable. It is significant, however, that in this deposition the plaintiff had the two vehicles approximately the same distance from the bridge, which coincides with the testimony of Hawkins, Whiston and Dees.

Taking the testimony of plaintiff himself which is most consistent with the physical facts, it is clear that plaintiff first observed defendant's truck jog into plaintiff's lane of the highway when the truck was at the irrigation lateral, 425 feet from the bridge, again when the truck was at the Martin Lamb driveway, 250 feet from the bridge, and a third time at some point between this driveway and the bridge; that plaintiff admits that he realized the truck was "completely out of control" when it was about 200 feet from the bridge; that plaintiff's bus must have then been about the same distance from the bridge. These facts, together with the admitted icy and dangerous condition of the highway, sustain the court's finding that "plaintiff must have seen the threatening situation and the possible danger of meeting on the bridge, especially when he observed the trouble defendant Hawkins was having with his truck and trailer." (Finding VII, R. p. 34).

4. Plaintiff Driving at Excessive Speed in View of Dangerous Condition of Highway.

The court found that plaintiff was traveling from 35 to 40 miles per hour and defendant's truck from 40 to 45 miles per hour when the drivers sighted each other and were from 850 to 1000 feet apart. (In the court's decision, the speed of defendant's truck was given as 40 to 45 miles per hour (R. p.

28), but through a typographical error this appears as 40 to 50 miles per hour in the findings.) (R. p. 35). There is ample evidence to support the court's decision. In a prior deposition Brownell had estimated his own speed at 35 to 40 miles per hour (R. p. 88). At the trial he estimated Hawkins' speed at 50 miles per hour (R. p. 84). Hawkins estimated his own speed at 35 miles per hour when he first observed plaintiff's bus (R. p. 363). He testified that prior to going over the hill he might have been going from 40 to 45 miles per hour (R. p. 380-1) and could not have gone over 45 miles per hour. Hawkins testified that the bus was traveling at about the same rate of speed as the truck (R. p. 363-4). Whiston had testified in a deposition that he estimated the two vehicles were about the same distance from the bridge and were traveling at about the same rate of speed (R. p. 194). He realized the roads were slick, his wife was nervous, and he had looked at the speedometer three or four times between Worland and the scene of the accident. When he looked about the time he first sighted the truck the bus was traveling between 30 and 35 miles per hour (R. p. 187). Dees estimated the speed of the bus at the Piel driveway at 35 miles per hour. He first testified that the truck was traveling about 35 miles per hour (R. p. 238), but later modified his testimony to say that he could not tell and that it could have been 35 or 45 or 50.

It is a reasonable inference from all of the testimony that the two vehicles were traveling at about the same rate of speed as the drivers came into sight of each other.

All of the witnesses agree that the roadway was covered with snow and ice all the way from Worland to the scene of the accident, a distance of nine miles, over which plaintiff had

driven. There is a conflict in the testimony with respect to the condition of the highway north of the accident over which Hawkins had driven. Plaintiff alleged in his complaint that Hawkins "negligently operated said truck at an excessive and dangerous rate of speed" (R. p. 5), and this was one of the acts of negligence relied upon by plaintiff.

Four witnesses, Walker, Booker, Dolezal and Ward, the highway patrolman, traveled the highway both north and south of the scene of the accident within an hour or two after its occurrence. All of them testified with respect to their own speeds, both north and south of the accident. The following parallel columns are enlightening, particularly in view of plaintiff's contention that Hawkins' speed was dangerous and excessive, but that the court erred in finding that plaintiff also was traveling at an excessive rate of speed:

WITNESS	SPEED NORTH OF ACCIDENT	SPEED SOUTH OF ACCIDENT
Walker	Traveled "75 miles or better" (R. p. 292) "75 to 80," which he considered safe (R. p. 294)	35 to 40 (R. p. 296)
Booker	50 to 60 (R. p. 303)	35 to 40 (R. p. 305)
Dolezal	50 to 60, considered 60 safe speed (R. p. 311)	Slower, 50 to 60 would not be safe (R. p. 311)
Ward	"60 or better (R. p. 395) This was safe speed (R. p. 403)	"I don't think I exceeded 30 miles an hour, 25 the majority of the time. (R. p. 402)

The average speed actually traveled by these four witnesses north of the accident (the road over which Hawkins had traveled) was 20 to 25 miles faster than the speed they actually

traveled south of the accident (the road over which plaintiff had traveled). The same witnesses estimated the safe speed north of the accident from 20 to 25 miles per hour greater than south of the accident.

Yet plaintiff is in the position of contending that Hawkins' speed was "dangerous and excessive" but questioning the court's finding that plaintiff was driving "at an excessive rate of speed in view of the hazards which existed by reason of the slippery condition of the highway." (Finding XI, R. p. 35.) Clearly, if there was any basis for the court's finding that defendant's driver Hawkins was negligent in travelling at an excessive speed, the court was fully justified in finding that the speed of plaintiff's bus was also excessive and dangerous.

5. Plaintiff's Speed at Point of Impact was Proof of His Negligence.

Even more significant in establishing plaintiff's negligence is the testimony with respect to the speed of plaintiff's bus at and near the point of impact.

(a) Speed at Point of Impact.

Plaintiff himself estimated the speed at 15 miles an hour at the point of impact (R. p. 64-5). Dees estimated the speed at point of impact at 20 to 25 miles an hour (R. p. 229). Whiston testified: "It seemed to me shortly before the impact the speedometer reading was around 20." (R. p. 187). He had testified at a prior deposition: "The last time I looked it was 30 miles, which was just before the bus got to the bridge I would say." (R. p. 193).

(b) Speed and Failure to Slow Down or Stop.

In other words, under the testimony of plaintiff's own witnesses the bus was still traveling from 15 to 25 miles an hour

at the point of impact. Under Whiston's testimony at his deposition it had been traveling 30 miles per hour just before it reached the bridge. Plaintiff concedes that he observed defendant's truck make the first swerve to the east side of the highway near the irrigation lateral, 425 feet from the bridge (when plaintiff must have been at least 850 feet away). He testified that he realized defendant's truck was "completely out of control" when it was about 200 feet north of the bridge (R. p. 68) (when plaintiff must have been about 400 feet away). Obviously plaintiff was traveling too fast to stop before the vehicles collided. Plaintiff finds himself in this dilemma: either he was traveling too fast when he first observed defendant's truck swerve at the irrigation lateral and again when it went out of control, or he failed to exercise ordinary care in slowing down his vehicle after observing the swerve and the truck in a position of peril.

(c) Stopping Distance for Bus.

Plaintiff testified as follows with respect to the distance within which he could stop his bus going at a speed of 35 to 40 miles per hour on the roads as they were approaching the scene of the accident:

"Q. Would you state your, from your experience how far, what distance rather you would have had to travel with your bus going at the speed of 35 to 40 miles an hour taking into consideration the roads as you saw them that day before you could bring it to a stop?

"A. About 250 feet.

"Q. Wouldn't that be nearer 300 feet?

"A. That is just an estimate.

"Q. How? A. That is just an estimate.

"Q. Well, of course it would be an estimate but wouldn't that be using the best braking and ideal braking situation, or fanning them as truckers call it, and bringing it to a stop on that icy road?

"A. You mean it would be closer to 300 feet?

"Q. Yes.

"A. I wouldn't say so. I estimated it 250 feet.

"Q. How far did you travel to bring it down from a speed of 35 to 40 miles an hour to a speed of 15 miles an hour, that is, your bus traveling on that icy road?

"A. Well, I suppose about 180 feet.

"Q. The way you brake it down you would have to roll about 180 feet to get your speed down from 35 miles you were going down to 15 miles an hour?

"A. Yes.

"Q. That would be your best judgment and how much faster would you have had to gone to completely stop it?

"A. About 50 feet.

"Q. And isn't it a fact that the snow and conditions interfered to some extent with your vision?

"A. Well very little; you could see half a mile clearly."
(R. pp. 91-92).

Whether plaintiff could in fact stop within 250 feet is immaterial. If, as he himself testified, he could have stopped in that distance, obviously he was negligent in failing to do so. After all, in a distance which must have been about 425 feet, under his own testimony plaintiff reduced his speed from 30 to 35 miles an hour to 15 miles an hour. Under the testimony of Whiston and Dees he reduced from 30 to 35 miles down to 20 to 25 miles an hour. Again plaintiff finds himself in this dilemma: if plaintiff was unable to reduce his speed any more than that in the distance so traveled, whether 200 or 425 feet, he was going too fast under the icy condition of the highway. If he could have reduced his speed and brought his bus to a stop and failed to do so, he was equally negligent.

(d) Application of Brakes and Failure to Slow Down or Stop.

Plaintiff testified that he first applied his brakes when the truck was at the lateral 425 feet from the bridge (R. p. 61). Whiston could not tell whether an application of the brakes was

made, testifying, "all I knew the bus was slowing down but whether he was using compression or brakes I couldn't tell." (R. p. 187). Dees likewise could not tell whether plaintiff applied the brakes (R. p. 228). But this much is certain: the bus was still traveling 15 to 25 miles an hour at the point of impact. Plaintiff again faces the same dilemma: if he first applied his brakes when the two vehicles were about 850 feet apart, then he was either traveling too fast in view of the icy condition of the highway or he did not exercise ordinary care in slowing down, when, after traveling some 425 feet, he was still going 15 to 25 miles an hour. Even after he observed the truck completely out of control approximately 200 feet north of the bridge and when he must have been at least 200 feet south of the point of impact, he was still traveling too fast in view of the icy condition of the highway or he did not exercise ordinary care in slowing down or stopping, because he was still going from 15 to 25 miles an hour after traveling the intervening 200 feet.

6. Plaintiff Could Have Turned Off at Piel Driveway.

The court found that both drivers were familiar with the highway and could see turnouts thereon and could have avoided the collision by using them (R. p. 26).

Plaintiff conceded that had he realized defendant's truck was going to get out of control he could have pulled off at the Piel driveway. We quote his testimony on this point:

"Q. After the first swerve that was made by the truck would you have had an opportunity to get off the road or to go some place to avoid the oncoming truck?

"A. After the first swerve?

"Q. Yes.

"A. It is possible if I had realized that he was going

to get out of control that I could have pulled off right at the Piel driveway, however, I would have been taking a chance of still going into that drainage ditch." (R. pp. 67-8).

Plaintiff's counsel argue that there was no duty on the part of plaintiff to act at that point. There can be no question, however, that he had already observed the truck swerve to plaintiff's side of the highway. He knew the icy and dangerous condition of the road. As the court has found, he must "have seen the threatening situation and the possible danger of meeting on the bridge, especially when he observed the trouble defendant Hawkins was having with his truck and trailer." (R. p. 34) Instead of turning off at the Piel driveway, he risked the consequences of continuing down the highway and failed to slow down and stop, either because he was unable to do so by reason of excessive speed or because he did not take the proper action to bring his vehicle to a stop. In either event he did not have his vehicle under proper control in view of the icy and dangerous condition of the highway.

7. Foregoing Facts Sustain Findings of Negligence on Part of Plaintiff.

The physical facts and testimony of the witnesses show clearly that either plaintiff's speed was excessive in view of the icy and dangerous condition of the highway, or that plaintiff did not exercise ordinary care to slow down and stop when he observed the other vehicle in danger. If he could not stop or reduce his speed to less than 15 to 25 miles per hour in the 425 feet he traveled after observing the first swerve of the truck and applying his brakes, or even the 200 feet he traveled after realizing the truck was completely out of control, then his speed was excessive. If he could have stopped and failed

to do so, then he either failed to maintain a proper lookout or failed to have his vehicle under proper control. Actually, as the court has found, a combination of negligence in all of these particulars was a contributing and proximate cause of the resulting collision. The record not only contains substantial evidence to support the court's findings of negligence, but we submit impels such findings.

PROXIMATE CAUSE

Appellant's counsel contend that even though the court might find that plaintiff was negligent, such negligence was not a proximate cause of the resulting collision. In support of this contention they rely upon the Wyoming case of *O'Mally v. Eagan*, 43 Wyo. 233, 2 P. (2d) 1063, and the textbooks and decisions therein cited. They overlook entirely the more recent and pertinent Wyoming case of *Pierce v. Bean*, 57 Wyo. 189, 115 P. (2d) 660.

A careful analysis of the decision in *O'Mally v. Eagan*, however, does not sustain plaintiff's contention, due to the total dissimilarity of facts. In the *Eagan* case, a car driven by Eagan, in which plaintiff was riding, was on the wrong side of the road. The defendant testified that he supposed Eagan would turn to his own side of the road until he "was within 50 feet from Eagan, when he realized the latter would not turn out." The road was 24 feet wide, with pavement thereon 19 and one half feet in width. That accident was in June and there is no suggestion in the decision of any dangerous condition of the highway. It is true the court held under this state of facts that the speed of the defendant was not the proximate cause of that accident. Nevertheless the court did recognize that in a proper

case the speed and other acts of negligence of the driver of a vehicle on the right side of the road might well be a proximate cause of the accident. In that connection the court said:

"Something more must appear in order that it may be said to have contributed to the accident, as, for instance, the duty to stop, the inability to do so by reason of the excessive speed, and that, had defendant stopped, the accident could have been avoided." (p. 1068)

Such a case was the subsequent Wyoming case of *Pierce v. Bean* (1941), 57 Wyo. 189, 115 P. (2d) 660, where the plaintiff, who was traveling south on a main highway, collided with defendant's car, which had entered the highway from a side road to the east. In affirming a judgment based upon the trial court's finding that both plaintiff and defendant were negligent, the Supreme Court said:

"The accident occurred about noon on a clear, cold, windy day. The Lincoln highway, which is oil-surfaced for the width of 21 feet, was at the time covered with a sheet of ice, and as stated by plaintiff and other witnesses, was 'slippery and very dangerous.' A state highway patrolman testified, without objection that a speed greater than 20 miles an hour was not safe. From a point about 250 feet north of the junction, the highway toward the junction ran down a hill of seven per cent grade. Plaintiff's truck with its load weighed 8,000 pounds, and there were no chains on the wheels. Plaintiff testified that when he was about 1000 feet from the junction he saw the coupe on the side road, and when about 150 feet from the junction saw that the coupe was being driven onto the highway. He testified also that when he saw the coupe enter the highway at the junction, 'the only thing I could do was to take to the right of the road and try to avoid a crash. * * * There was no opportunity to stop in that distance whatsoever under the conditions of the road * * * If I had applied the brakes, I would have skidded straight ahead into the man * * *. It would have been a matter of impossibility for me to have controlled the front wheels of my truck in any di-

rection.' Estimates of the speed at which plaintiff was driving differed. Plaintiff himself testified first that his speed was 'approximately twenty miles an hour.' Later he said it was 'between twenty and thirty miles an hour,' and still later that at no time was over 25 miles an hour 'for the simple reason that it was impossible.' A witness who was driving another truck in sight of and following plaintiff, testified that plaintiff was driving at the rate of 25 miles an hour. It is not necessary to refer to other evidence on this point. We think the trial judge may reasonably have believed that plaintiff was traveling at a speed of at least 25 miles an hour. The travel surface was ice, the grade descending, the vehicle without chains, the driver unable to stop or slow down when he saw the coupe at the junction ahead. **We hold that the trial judge was justified in deciding that a proximate cause of the collision was plaintiff's negligence in driving at a speed that was not reasonable and proper under the conditions.**" (p. 661) (Emphasis supplied).

In the case of *O'Mally v. Eagan*, the Wyoming court quoted from *Blashfield's Cyclopedia of Automobile Law*. A subsequent edition of the same work contains substantially the statement quoted by the Wyoming court to the effect that ordinarily the motorist has a right to assume that the driver of a vehicle coming from the opposite direction will obey the law and to act upon such assumption in determining his own manner of using the road. This general statement, however, is followed by this exception:

"These assumptions may not be indulged in however, after he sees or ought to see, from the situation of the cars or highway or the conduct of the approaching driver, that they are unwarranted. In other words, the duty of any automobile driver, who is on the right side of the street, to stop or take other precautions to avoid a collision with an approaching vehicle, only arises when by due care he discovers that another on the wrong side of the street cannot or will not himself turn to the right to clear his way." (Vol. 2, Par. 919, pp. 62-3).

There are many cases in support of this rule, including the following:

Kapla v. Lehti, (Minn. 1948) 30 N.W. (2d) 685, in which the court said:

“In numerous of our decisions we have held that the driver of an automobile on his own right side of the road must exercise due care to avoid collisions with other vehicles, even with those on his side of the road, and that, while he may assume that an approaching vehicle on his side of the road will turn and get on its right side, he will not be permitted to act on the assumption where the factual basis for it has disappeared, as, for example, where it becomes apparent that the driver on the wrong side of the street either will not or cannot turn back to his right side.” (p. 691)

Hoke v. Atlantic Greyhound Corporation, (N.C. 1947) 42 S. E. (2d) 593:

“However, the right of a motorist to assume that a driver of a vehicle coming from the opposite direction will obey the law and yield one half of the highway, or turn out in time to avoid collision, and to act on such assumption in determining his own manner of using the road, is not absolute. It may be qualified by the particular circumstances existing at the time, —such as ‘the proximity, position and movement of the other vehicle and the condition of the road as to the usable width and the like.’ (citing cases)

“Moreover, notwithstanding the right of a motorist to so assume still this does not lessen his duty to conform to the requirement of exercising due care under the existing circumstances, that is, to conform to the rule of the reasonably prudent man.” (p. 597)

Williams v. Brown, (La. 1937) 181 So. 679:

“It is true, as is said by Blashfield, that a motorist has the right to assume that one approaching him will hold his side of the road, or, if not entirely thereon, will regain it in time to avoid a collision, but this rule, as is also said by him, is not without its exceptions. If the motorist from all appearances, has good reason to believe that the operator

of the approaching car does not realize the perilous situation he has created and is continuing or, from the situation in a general way, has no reasonable ground upon which to assume that such operator will timely resume travel on his side of the road, it devolves upon him to exercise all due diligence and precaution and to take such action as will avoid an emergency and avert the impending accident." (p. 682)

Gray v. St. Johnsbury Trucking Co., (Vt. 1949) 68 A (2d) 697:

"The truck driver had the right to assume that the bus driver would observe the law and seasonably move over to his own side of the highway so as to pass without interference and the truck driver had the right to proceed on that assumption until he saw, or in the circumstances ought to have seen, that it was unwarranted. But such an assumption must not be persisted in after the actor knows facts showing that it will not be true. *Hatch v. Daniels*, 96 Vt. 89, 94, 117 A. 105. So when the truck driver saw, or ought to have seen, that the bus driver would not get out of the way, he was bound to exercise the care of a prudent man to avoid injuring the plaintiff's intestate. Whether he did so under the facts prevailing here was for the jury to decide." (p. 698)

It is of course well settled that to defeat recovery on the ground of contributory negligence, it is not necessary that plaintiff's negligence be the sole proximate cause of the accident. This rule is well stated in *Blashfield's Cyclopedia of Automobile Law and Practice*, Vol. 4, Par. 2553, page 52, as follows:

"The converse of the above rule is also true: to defeat recovery on the ground of contributory negligence, it is not necessary that the negligence should be the sole proximate cause of the accident, but it is sufficient if it proximately contributed in any degree to the accident, or so contributed to the accident that but for such negligence the accident would not have occurred."

Had it not been for the contributory negligence of plaintiff this accident would not have occurred. Plaintiff first observed

defendant's truck swerve to the east side of the highway and could see the danger ahead when they were at least 850 feet apart. He observed defendant's vehicle completely out of control when they were some 400 feet apart. He was aware of the extremely icy and dangerous condition of the highway over which he had traveled for more than nine miles. Had he been traveling at a proper rate of speed in view of the condition of the highway and had he exercised proper control in slowing down and bringing his vehicle to a stop after observing the dangerous situation confronting both drivers, there would have been no collision and plaintiff would not have sustained his injuries. Instead plaintiff under his own testimony and that of his own witnesses was traveling from 15 to 25 miles an hour when the collision occurred.

After defendant's truck started to skid and particularly after it went completely out of control, plaintiff could have avoided the accident except for his excessive speed and his failure to use due diligence in operating his bus after observing defendant's truck in a dangerous position. Such negligence was clearly a proximate cause of the accident.

APPELLANT'S INFERENCES OF ERROR NOT JUSTIFIED

As stated above, Appellant's Brief presents little to support the contention that there was no evidence to sustain the court's findings. Instead counsel rely upon inferences which are not supported by the record and suggest: (1) that the court "applied the wrong legal standards of care to the conduct of plaintiff," and (2) that the trial judge "voiced uncertainty as to the correctness of his decision."

1. Legal Standards of Care Applicable to Plaintiff's Conduct.

In support of their first suggestion, counsel refer repeatedly to the so-called Hennessy cases involving actions for the death of two passengers in the bus. They take, out of context, an excerpt from the court's decision calling attention to plaintiff's knowledge, among other things, that care and caution would be required to insure the safety of his passengers. The court is not there speaking of any legal standard or degree of care. In the findings of fact the court expressly found that "plaintiff did not exercise ordinary care" in the particulars therein specified (Finding XI, R. p. 35). There is no basis for any inference that the court did not fully appreciate the distinction between the degree of care required with respect to passengers and that required with respect to plaintiff's own safety.

It is absurd to assume that a distinguished jurist of the ability of the trial court, with more than twenty-five years experience as a Judge of the Federal District Court, would fail to appreciate and apply a distinction so elementary.

It should be noted also that after the trial of this action a transcript of the evidence was prepared and briefs were filed before the court's decision. The decision itself shows the careful attention given to the case by the trial court. There was oral argument on the motion for new trial, followed again by the filing of briefs by counsel for the respective parties, "all of which," the court states in the order denying the motion, "were presented to the court in an able manner and with an exhaustive discussion of the fact situation and review of many of the law points heretofore submitted" (R. p. 41).

While none of the trial briefs are before this court, it may

be safely assumed that the able counsel for appellant did not overlook a full presentation of the legal standards applicable to the conduct of plaintiff. Any inference that the court might have been confused on this point is without foundation.

2. No Basis for Suggestion of Doubt in Mind of Trial Court.

Appellant's counsel finally contend that the trial court was uncertain and in doubt with respect to the correctness of his decision. We respectfully submit that a careful reading of the original decision and the order denying the motion for new trial in their entirety reflect no doubt or uncertainty in the mind of the trial court. It is true the court suggested in the original decision that if he had committed error, this tribunal would find and apply the correct solution; and in the order denying motion for new trial stated that whether the trial court was correct would not be known until a review could be had by higher authority. This latter statement, however, followed immediately after the court's statement that he had "been unable to find any new matter of sufficient importance to cast doubt on the correctness of the decision, findings and conclusions heretofore rendered." (R. p. 42). The comments of the trial court quoted in Appellant's Brief are not in any sense an expression of doubt, but rather a recognition by the court "of his serious duty to determine the responsibility for this tragic occurrence by resolving the evidence and attending circumstances to the best of his judgment and ability." (R. p. 29). Reading the italicized portion quoted in Appellant's Brief (p. 13) with the remainder of the paragraph suggests an understandable concern on the part of the trial court in reaching a correct conclusion, particularly in view of the serious nature of plaintiff's

injuries. The entire decision leaves no doubt, however, that it was based upon a most careful and conscientious consideration of all of the evidence and legal principles applicable to the case and that such consideration impelled a finding of negligence on the part of the plaintiff.

We agree with counsel for appellant that the trial court must be presumed to have had full knowledge of the well established rules applicable to appeals to the circuit court of appeals and that the rules are correctly stated in Appellant's Brief (pp. 19-20). These rules were specifically recognized by this court in the case of *Ocean Accident & Guaranty Corporation v. Rubin*, 73 F. (2d) 157, where the court said in part:

"At the outset, it must be remembered that: 'Where a case is tried by the court, a jury having been waived, its findings upon questions of fact are conclusive in the courts of review, it matters not how convincing the argument that upon the evidence the findings should have been different. *Stanley v. Supervisors*, 121 U. S. 547, 7 S. Ct. 1234, 30 L. Ed. 1000, 1002.'

"*Dooley v. Pease*, 180 U. S. 126, 131, 132, 21 S. Ct. 329, 331, 45 L. Ed. 457.

"In the Dooley case, *supra*, the court continued: 'Errors alleged in the findings of the court are not subject to revision by the circuit court of appeals or by this court, if there was any evidence upon which such findings could be made. (Cases cited.)'

"Citing the Dooley Case, *supra*, with approval, the Supreme Court reaffirmed the foregoing rule in the case of *United States v. Jefferson Electric Mfg. Co.*, 291 U. S. 386, 407, 54 S. Ct. 443, 78 L. Ed. 859, decided February 12, 1934." (p. 163)

With the trial court appreciating the effect of the foregoing rules and having on motion for new trial carefully considered "the facts, authorities, and arguments presented, which was also done by the court after the trial on the merits" (R. p. 41-2),

it must be assumed that the motion would have been granted had there been doubt in the court's own mind that his decision was correct. On the contrary the court expressly states that nothing was presented in connection with the motion for new trial "to cast doubt on the correctness of the decision, findings and conclusions heretofore rendered in said cause." (R. p. 42).

CONCLUSION

1. The evidence fully supports the court's findings that plaintiff did not exercise ordinary care on his part in the following particulars:

"(a) While approaching the point of collision plaintiff did not have the bus he was driving under proper control and drove the same without due caution and at an excessive rate of speed in view of the hazards which existed by reason of the slippery condition of the highway.

"(b) Plaintiff did not maintain a proper lookout when approaching the point of collision, when had he looked he could have observed defendants' truck out of control on the highway and could have stopped the bus he was driving and avoided said collision.

"(c) Plaintiff failed to slow down or slacken the speed of the bus he was driving and bring the same under proper control when the approaching truck of the defendant was in plain sight and it appeared likely the vehicles would meet at or near said bridge."

(Finding XI, R. pp. 35, 36.)

2. Each and all of the foregoing acts of negligence of plaintiff was a proximate cause of the collision, without which the collision would not have occurred.

3. There is no basis for appellant's inferences that the trial court did not apply the proper legal standards or was in doubt with respect to the correctness of the decision. On the contrary, it is clear that the court applied to plaintiff's conduct the correct

legal standard of "ordinary care;" and that the court's decision reflects a careful and conscientious consideration and analysis of all of the evidence and legal principles, impelling in the mind of the trial court the conclusion that plaintiff was guilty of negligence and that such negligence was a proximate cause of the collision.

Respectfully submitted,

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United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 12875
CIVIL

ERNEST B. BROWNELL,

Appellant,

vs.

FRED M. MANNING, INC.,

Appellee.

Appeal from the United States District Court
for the District of Montana.

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

In responding to the various questions presented by appellee's brief we shall attempt to follow so far as possible the same order in which the questions have been raised in such brief, using wherever possible the sub-headings which appear therein.

STATEMENT OF FACTS

Appellee questions the statement that "the other vehicle was some forty feet north of the Martin Lamb driveway when he first started to pay attention to it." We note that in our earlier brief the record page ref-

erence was stated in error as page 50 instead of page 60. The specific evidence of Brownell which prompted the foregoing statement of fact was as follows:

“Q. How far north of the Martin Lamb driveway is the spot that you have indicated where you first started to pay attention to the other vehicle?

A. That is 40 feet, according to this” (R. p. 60).

We respectfully submit that the above quoted question and answer must be read in conjunction with the further quotation from the testimony shown on page 2 of appellee's brief.

Plaintiff Drove Nine Miles Over Dangerous Icy Highway to Point of Collision.

It is not disputed that the roadway was covered with snow and ice all the way north from Worland to the bridge but appellant drove his vehicle this distance without incident or mishap. The record does not indicate the extent of traffic on the highway at or about the time of the accident and whatever the number of vehicles appellant may have met in this distance of nine miles there is nothing to show that he encountered any previous difficulty whatsoever in meeting such oncoming vehicles.

We know of no rule of law which would require appellant to be prepared to avoid skids of approaching vehicles as stated at page 5 of appellee's brief.

Drivers Could See Danger Ahead When Vehicles Were 850 Feet to 1,000 Feet Apart and Equi-Distant from Narrow Appearing Bridge.

The writer of appellant's brief and of this reply brief was not present at the time of trial. It does appear from a reading of the Record that there may be ambiguity as to whether the first skid of appellee's truck took place ap-

proximately at the irrigation lateral or when the truck was some 40 feet north of the Martin Lamb driveway. However, it certainly appears to be clear and definite upon any reading or interpretation of the evidence of both drivers that this first skid gave no indication to either driver that the truck would subsequently go out of control. We have sufficiently commented on this phase of the case in our earlier brief.

Plaintiff Must Have Seen Threatening Situation and Possible Danger of Meeting on Bridge.

We must reiterate that both drivers did not anticipate a meeting on the bridge and danger associated therewith.

We quite agree with appellee's insistence at pages 9 and 10 of its brief that the truck could not have been 415 feet from the point of impact and the bus only 185 feet from such point. We again suggest that under the evidence it appears that when the bus was some 185 feet from the point of impact, the truck was 40 feet north of the Martin Lamb driveway, or approximately 270 feet from the point of impact.

There is no basis for the suggestion of counsel at page 10 of appellee's brief that Brownell must have been some distance south of the Piel driveway when he observed the first swerve of the truck. Brownell did not testify that "he could have *turned into* the Piel driveway after observing the swerve." His testimony was as follows:

"A. Was there any opportunity from the time that you first noticed this other vehicle at the irrigation lateral until the moment of impact for you to get off the road or away from the oncoming vehicle?

A. No.

Q. After the first swerve that was made by the truck would you have had an opportunity to get off the road or to go some place to avoid the oncoming truck?

A. After the first swerve?

Q. Yes.

A. It is possible if I had realized that he was going to get out of control that I could have pulled off right at the Piel driveway, however, I would have been taking a chance of still going into that drainage ditch" (R. pp. 67-68).

Plaintiff Driving at Excessive Speed in View of Dangerous Condition of Highway.

It is true that in the complaint in this action among the various allegations of negligence was asserted the dangerous and excessive speed of the truck. It is fair to conclude from the evidence that the bus had been proceeding for a distance of some nine miles at a speed not too substantially lower than that of the truck. Assuming that both vehicles under existing conditions were traveling at a speed which might be considered excessive the most that can be said is that the speed of the bus was such that when the truck skidded on to and remained on the wrong side of the highway Brownell was not able to bring his vehicle to a stop without colliding with the truck. This matter of excessive speed must be considered in connection with the question of proximate cause. We have referred in the earlier brief to the Wyoming case of *O'Mally v. Eagan*, 43 Wyo. 233, 2 Pac. (2d) 1063, without including specific quotation therefrom. The following quotation from the case of *Stobie v. Sullivan*, 118 Me. 483, 105 Atl. 714, is set forth in the opinion:

"If each had been on his own side, no trouble would have occurred, as the highway at that point was a state road, straight, wide, smooth, and well wrought. It was not the speed of either party that was the proximate cause of the accident, but the position of one car or the other on that side of the road where it did not belong."

Applying the law to the facts of the case there at bar the Court went on to state:

“Speed, considered by itself, cannot, accordingly, be said to have necessarily contributed to the accident in question. That is clear when we bear in mind that if the defendant had traveled at a lawful rate of speed, but had started a few minutes earlier, he would have been at the place of accident just the same. The speed, therefore, considered by itself, may have been merely a condition of the accident, and remote in the chain of causation, from which no liability arose.”

We cannot appreciate the insistence of counsel for appellee that the case of *Pierce v. Bean*, 57 Wyo. 189, 115 Pac. (2d) 660, is more pertinent than the *O'Mally* case. It is our understanding of the law that whatever conditions may exist at the time of an accident, driving at a speed not reasonable and proper under such conditions is excessive speed. But there is a very substantial difference between the legal obligation of a driver to a vehicle approaching from the opposite direction and the legal obligation of a driver approaching an intersection to another vehicle approaching the same intersection from the cross or intersecting street. The latter was the situation involved in the case of *Pierce v. Bean*, *supra*.

We previously called attention to the annotation in 77 A. L. R. 598 and we shall not lengthen this brief by quoting therefrom. The applicable rules of law involving a vehicle proceeding at an excessive speed which collides with another vehicle on the wrong side of the highway are well defined and we have no argument with the quotations appearing on pages 21 through 23 of the appellee's brief. These various quotations confirm the position taken in our earlier brief that no legal duty devolved upon Brownell until he “either became aware of the

danger or, under the law, should have become cognizant thereof" (p. 15).

We respectfully submit that there is absolutely no evidence in the record upon which a court could say that Brownell was guilty of any negligence in the operation of his bus after it became apparent that the approaching vehicle on the wrong side of the road would not or could not turn back to his right side. Assume for the moment that the bus was being driven at a much lower rate of speed and that as in the case at bar an approaching vehicle skidded out of control on to the wrong side of the highway so closely in front of the bus that even at the much lower rate of speed the bus could not be stopped in time to avoid a collision. In such a case it would have to be conceded that the presence of the vehicle on the wrong side of the highway was the sole proximate cause of the collision. That is exactly the same situation which exists in this case. Whether the vehicles are a short or somewhat longer distance apart when the dangerous condition is created is not material if in fact the dangerous condition arises at a point where because of the speed of the respective vehicles collision cannot be avoided. Speed in such a case is merely a condition of the accident and remote in the chain of causation and it is not the speed of either party that is a proximate cause of the accident but rather the position of one vehicle on that side of the road where it did not belong.

Legal Standards of Care Applicable to Plaintiff's Conduct.

We believe that in both this brief and our earlier brief we have clearly pointed out the several respects in which the trial court appears to have applied erroneous legal principles in reaching his decision.

CONCLUSION

We believe it conclusively appears as a matter of law that the presence of the truck on the wrong side of the highway was the sole proximate cause of this unfortunate accident. If this does not so appear conclusively there is certainly so much doubt and uncertainty as to the propriety of the conclusion reached by the trial court that, in the interest of justice, there should be a new trial on all issues to remove such doubt and uncertainty.

Respectfully submitted,

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No. 12878

**United States
Court of Appeals
For the Ninth Circuit.**

THOMAS T. CHAMALES, JR.,
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vs.
UNITED STATES OF AMERICA,
Appellee.

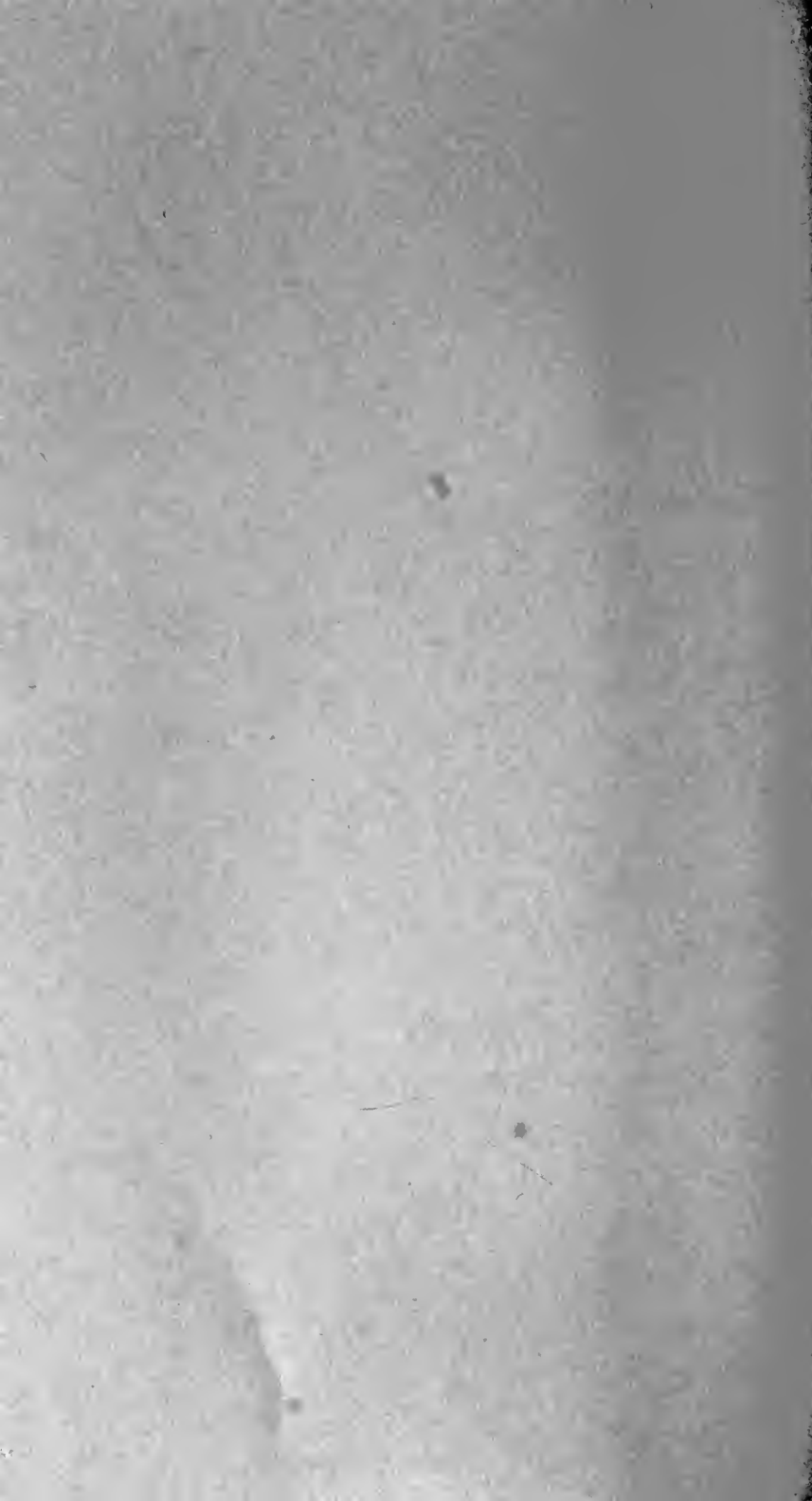
Transcript of Record

**Appeal from the United States District Court,
Eastern District of Washington,
Northern Division.**

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PAUL F. O'BRIEN,
CLERK



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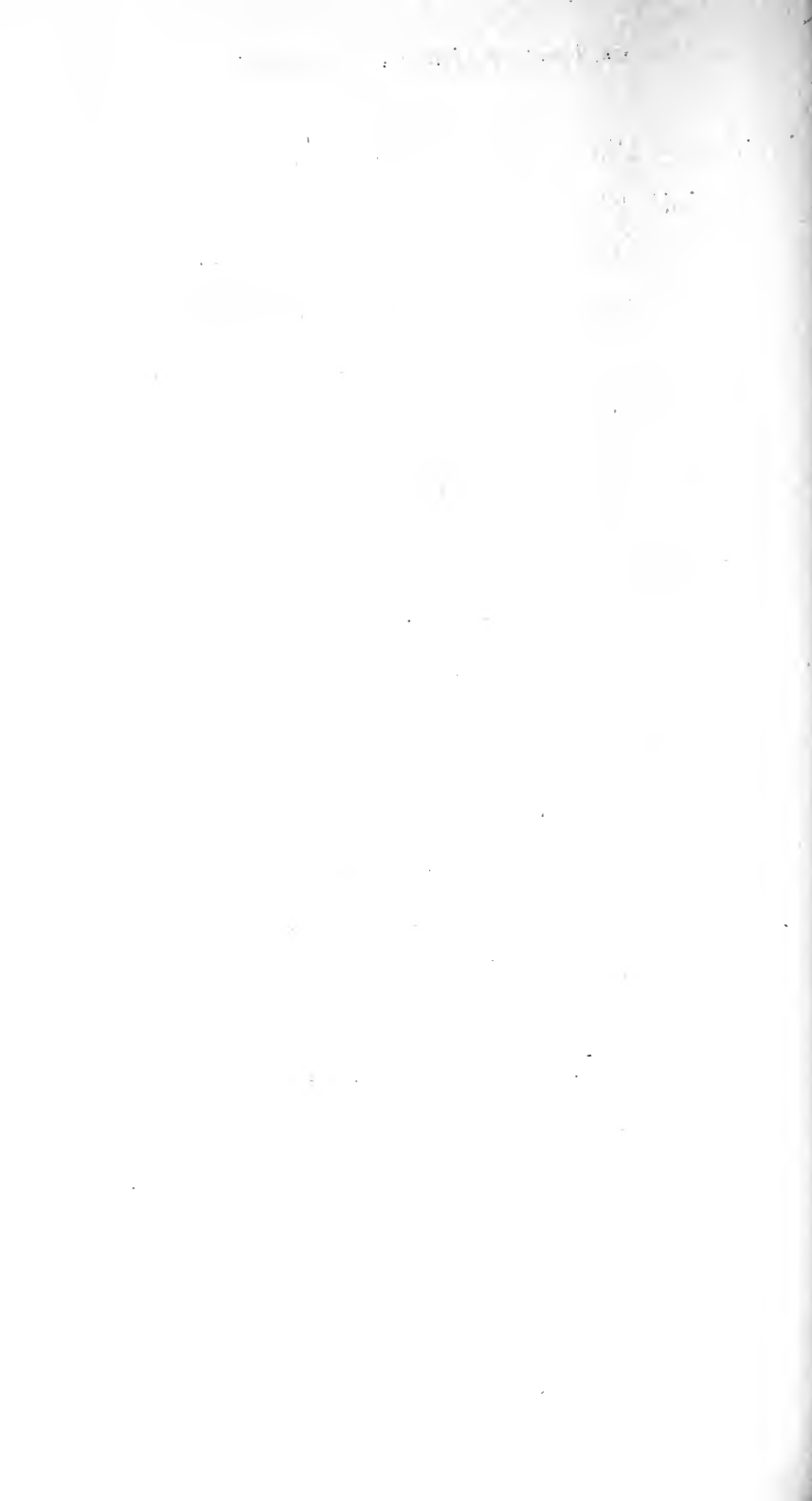
—direct 132, 136

—voir dire 135

—cross 139

—redirect 143

—recross 144



NAMES AND ADDRESSES OF
ATTORNEYS OF RECORD

HARVEY ERICKSON,
U. S. Attorney,

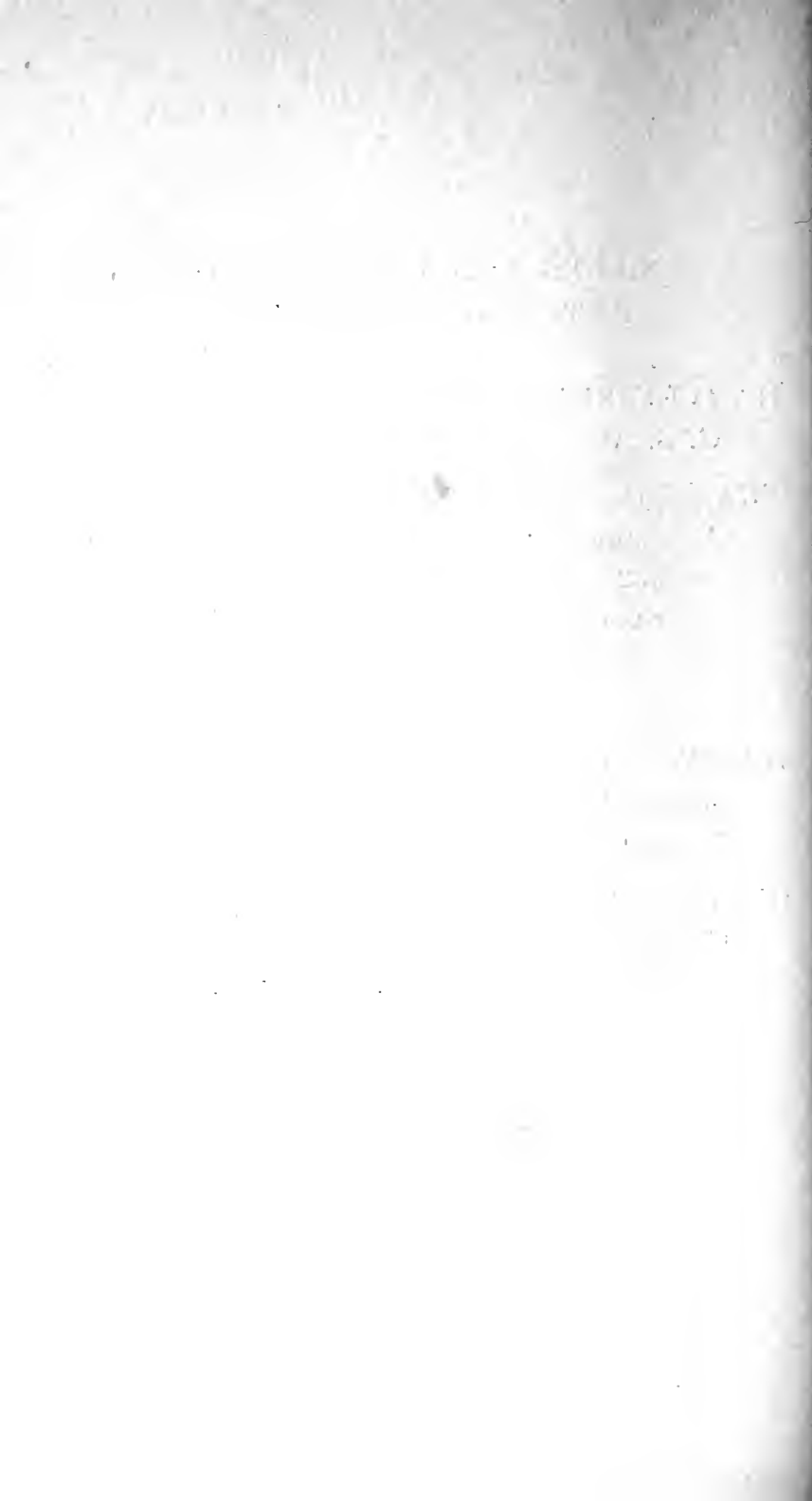
FRANK R. FREEMAN,
Assistant U. S. Attorney,
332 Post Office Building,
Spokane, Washington.

Attorneys for Plaintiff, and Appellee.

HARRY L. OLSON,
Miller Building,
Yakima, Washington.

GEORGE D. CROWLEY,
Chicago, Illinois.

Attorneys for Defendant, and Appellant.



[Title of District Court and Cause.]

INFORMATION

VIO: Sec. 2421, Title 18, U.S.C.

White Slave Traffic Act

The United States Attorney charges:

That Thomas T. Chamales, Jr. on or about the 10th day of March, 1949, did transport and cause to be transported, and aid and assist in transporting Elaine Elliot from Chicago, Illinois to Yakima, in the Southern Division of the Eastern District of Washington, for the purpose of prostitution, debauchery and other immoral purposes.

Dated this 23rd day of October, 1950.

/s/ HARVEY ERICKSON,
United States Attorney.

/s/ LLOYD L. WIEHL,
Assistant United States At-
torney.

[Endorsed]: Filed Oct. 23, 1950.

[Title of District Court and Cause.]

AMENDED INFORMATION

**VIO: Sec. 2421, Title 18, U.S.C
White Slave Traffic Act**

The United States Attorney charges:

Count I.

That Thomas T. Chamales, Jr., on or about the 10th day of March, 1949, did transport and cause to be transported, and aid and assist in transporting Elaine Elliot from Chicago, Illinois, to Yakima, in the Southern Division of the Eastern District of Washington, for the purpose of prostitution, debauchery and other immoral purposes.

Count II.

That Thomas T. Chamales, Jr., on or about the 14th day of August, 1949, did transport and cause to be transported, and aid and assist in transporting Elaine Elliot from Chicago, Illinois, to Yakima, in the Southern Division of the Eastern District of Washington, for the purpose of prostitution, debauchery and other immoral purposes.

Dated this 25th day of October, 1950.

/s/ HARVEY ERICKSON,
United States Attorney.

/s/ LLOYD L. WIEHL,
Assistant U. S. Attorney.

[Endorsed]: Filed Oct. 25, 1950.

[Title of District Court and Cause.]

DEFENDANT'S PLEA OF NOT GUILTY

Now, on this 9th day of January, 1951, into court comes the defendant Thomas T. Chamales, Jr., through his attorney Harry Olson, waives formal arraignment under the Amended Information heretofore filed against him, and being interrogated by the Court as to his plea thereto, defendant answers that he desires to enter a plea of Not Guilty, which plea is received by the Court and ordered entered on the records of the Court.

[Title of District Court and Cause.]

DEFENDANT'S PROPOSED INSTRUCTIONS

Proposed Instruction No. 9

You are instructed that even though you find from the evidence beyond a reasonable doubt that the defendant Thomas T. Chamales, Jr., had the intention that he would put the woman Elaine Elliott in the business of prostitution or have immoral sexual relations with her or allow or arrange for someone else to have immoral sexual relations with her but that he did not form such intention until reaching the State of Washington, then you must return a verdict of "Not Guilty."

Hoke v. U. S., 57 Law Ed. 523

Sloan v. U. S., 287 Fed. 91

Proposed Instruction No. 11

You are instructed that in order for you to find that the intent of the defendant, Thomas T. Chamales, Jr., was for himself to have immoral sexual relations with the woman, Elaine Elliott, you must find from the evidence beyond any reasonable doubt that the defendant formed a plan in his mind to have such immoral sexual relations at the time he transported or caused to be transported this woman across state lines, if you find that he did so transport or cause her to be transported, and you must find that it was his actual plan, seriously made as distinguished from a mere hope or desire or mere wishful thinking that such immoral relations could be accomplished if the woman was across the state border, and if you find that the defendant's intent was a mere hope or desire or anything less than an actual, seriously made plan to have immoral sexual relations with the woman, Elaine Elliott, then you must return a verdict of "Not Guilty."

Gerbino v. U. S., 293 Fed. 754

Proposed Instruction No. 16

You are instructed that if you find from the evidence presented to you during this trial that the defendant transported or caused to be transported the woman Elaine Elliott but that he did so with the intent that he was to employ her in his hotel, with which he was connected, in a legitimate and honest position, then you must return a verdict of "Not Guilty." Or if you find that the defendant's intent

was some other lawful purpose, then you must also return a verdict of "Not Guilty." Or even though you find beyond a reasonable doubt that the defendant intended that the transportation of Elaine Elliott was for immoral purposes but that such intent, if any, was secondary or a lesser intention or intentions and that some lawful or legitimate purpose was the defendant's main or primary purpose, then you must also return a verdict of "Not Guilty."

Yoder v. U. S., 80 Fed. (2nd) 665

U. S. v. Pope, 144 Fed. (2nd) 778

U. S. v. Jamerson, 60 Fed. Supp., 281

Copies received.

[Endorsed]: Filed Jan. 9, 1951.

District Court of the United States, Eastern District of Washington, Northern Division
No. C-8117

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THOMAS T. CHAMALES, JR.,

Defendant.

VERDICT

We, the jury in the above entitled cause, find the defendant Thomas T. Chamales, Jr. not guilty as charged in Count 1, and is guilty as charged in Count 2, of the Amended Information.

/s/ MONTE G. MOORE,

Foreman.

[Endorsed]: Filed Jan. 11, 1951.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

The defendant moves the Court to grant him a new trial for the following reasons:

1. The Court erred in denying defendant's motion for judgment of acquittal made at the conclusion of the evidence.

2. The verdict is contrary to the weight of the evidence.

3. The verdict is not supported by substantial evidence.

4. The Court erred in unduly restricting the cross-examination of Elaine Elliott in that:

(a) The Court should have permitted the defendant to use identifications 5, 6 and 7, being letters written by the witness Elaine Elliott, to show that said witness was shortly before meeting Thomas T. Chamales, Jr., in such a state of love with her then brother-in-law, Bobbie Elliott, that her testimony on the stand in this case that she was in love with the defendant at first sight was false.

(b) The Court should have received in evidence defendant's identifications 5, 6 and 7, 9 and 10 for the purpose of affecting or testing the credibility of Elaine Elliott, and for the purpose of showing moral delinquency on the part of Elaine Elliott affecting her credibility.

(c) The Court should have received in evidence defendant's identifications 5, 6 and 7 and permitted in connection therewith the defendant to show in the

cross-examination of Elaine Elliott that said Elaine Elliott had lied under oath with reference to the nature of a trip taken with her brother-in-law Bobbie Elliott, such testimony being material as affecting the credibility of Elaine Elliott.

5. The Court erred in permitting the United States Attorney in the cross-examination of the defendant to ask and to require the defendant to answer questions as to the identity of Tex Reed.

6. The Court erred in excluding the testimony offered by the defendant as to his need of psychiatric and other medical treatment, and as to the history of the medical and psychiatric treatment received by the defendant subsequent to his discharge from military service and up to date of trial.

7. The Court erred in charging the jury, and in refusing to charge the jury as requested.

8. The Court erred in refusing to admit defendant's identifications numbered 2, 3 and 8.

9. That the defendant was prevented from having a fair trial due to the United States Attorney in his closing argument to the jury having read in question and answer form the testimony of a government witness, Betty DesCorreau.

/s/ HARRY L. OLSON,

/s/ GEORGE D. CROWLEY,

/s/ JOHN WM. McARDLE,

Attorneys for Defendant.

Copy received.

[Endorsed]: Filed Jan. 12. 1951.

[Title of District Court and Cause.]

AFFIDAVIT OF HARRY L. OLSON IN SUPPORT OF MOTION FOR NEW TRIAL

State of Washington,

County of Yakima—ss.

Harry L. Olson, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the above named defendant, who was personally present at the trial of the above entitled action representing the defendant therein; that the United States Attorney in his closing argument to the jury read in question and answer form portions of the testimony of a Government witness, Betty Des Correau holding in his hand while addressing the jury and while reading therefrom what was or purported to be the testimony of said witness; that while the United States Attorney prefaced his reading of said testimony with a statement in substance: "This is the testimony of Betty Des Correau as I recall it." this remark was followed in fact by an actual reading from transcribed testimony then in his hands.

This affidavit is made in support of the defendant's motion for a new trial and for the purpose of evidencing as a matter of record the facts in connection with the argument to the jury of the United States attorney.

/s/ HARRY L. OLSON.

Subscribed and sworn to before me this 15th day of Jan., 1951.

/s/ FRED C. PALMER,

Notary Public.

[Endorsed]: Filed Jan. 16, 1951.

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR
NEW TRIAL

This matter coming on regularly for hearing on the 22d day of January, 1951 upon defendant's Motion for New Trial, and the United States of America being represented by Frank R. Freeman, Assistant United States Attorney for the Eastern District of Washington, and the defendant being represented by Harry Olson, his attorney, and the Court having heard the arguments of counsel and being fully advised in the premises, it is by the Court

Ordered, Adjudged and Decreed that the said Motion for New Trial be, and hereby is, denied.

Dated this 24th day of January, 1951.

/s/ SAM M. DRIVER,

United States District Judge.

Presented by:

/s/ FRANK R. FREEMAN,

Assistant United States At-
torney.

[Endorsed]: Filed Jan. 24, 1951.

District Court of the United States for the Eastern
District of Washington, Northern Division
No. C-8117

UNITED STATES OF AMERICA,

vs.

THOMAS T. CHAMALES, JR.

JUDGMENT AND COMMITMENT

On this 22d day of January, 1951, came the attorney for the government and the defendant appeared in person and by his attorneys Harry Olson and George Crowley.

It Is Adjudged that the defendant has been convicted upon his plea of Not Guilty, and a verdict of guilty of the offense of violation of the White Slave Traffic Act (Sec. 2421, Title 18 U.S.C.) as charged in Count 2 of the Amended Information and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two (2) Years.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that

the copy serve as the commitment of the defendant.

/s/ SAM M. DRIVER,

United States District Judge.

[Endorsed]: Filed Jan. 22, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and Address of Appellant: Thomas T. Chamales, Jr., Fox Hotel, Elgin, Illinois.

Name and address of Appellant's Attorneys: Harry L. Olson, John Wm. McArdle, 302 Miller Building, Yakima, Washington.

George D. Crowley, 135 South LaSalle Street, Chicago 3, Illinois.

Offense:

Violation White Slave Traffic Act, Section 2421, Title 18, U.S.C., as charged in Count 2 of amended information.

Concise statement of judgment or order, giving date and any sentence:

Judgment of conviction on Count 2 of the amended information and sentence of two years imprisonment. Judgment dated January 22, 1951.

The defendant is on bail and not now confined.

I, the above named defendant and appellant here-

by appeal to the United States Court of Appeals from the 9th Circuit from the above stated judgment dated January 22, 1951.

/s/ THOMAS T. CHAMALES, JR.,
Defendant and appellant.

/s/ HARRY L. OLSON,
Of Counsel for Appellant.

The above notice of appeal was filed with the Clerk of the above entitled court in duplicate on January 22, 1951.

/s/ H. A. FRAMBOISE,
Clerk.

Copy received and service accepted.

[Endorsed]: Filed Jan. 22, 1951.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

To the Clerk of the Above Entitled District Court:

Comes now the above named defendant who has appealed to the United States Court of Appeals in the Ninth Circuit in the above entitled action and designates the following as a portion of the records, proceedings and evidence to be contained in the record on appeal:

1. Information dated and filed October 23, 1950.

2. Amended Information dated and filed October 25, 1950.

3. Motion for transfer, dated October 27, 1950.

4. Order of Transfer, dated November 20, 1950.

5. Record of the court showing arraignment and plea of "Not Guilty."

6. Reporter's complete transcript of trial proceedings.

7. All exhibits and identifications.

8. Records of the court showing verdict of the jury.

9. Defendant's motion for a new trial filed January 12, 1951.

10. Affidavit of Harry L. Olson in support of motion for new trial.

11. Order denying motion for new trial.

12. Judgment and sentence, dated January 22, 1951.

13. Notice of appeal.

14. This designation of record and affidavit of service by mail thereof.

15. Statement of points.

You will please include this data in making up the record on appeal.

Dated February 5, 1951.

/s/ HARRY L. OLSON,

Of Counsel for defendant-
appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed Feb. 6, 1951.

[Title of District Court and Cause.]

SUPPLEMENTAL DESIGNATION OF
RECORD ON APPEAL

To the Clerk of the Above Entitled District Court:

Comes now the defendant and in connection with his appeal of the above case to the United States Court of Appeals of the Ninth District designates the following additional matter to be included in the record on appeal:

1. Defendant's proposed instructions numbered 9, 11 and 16.
2. This Supplemental Designation and affidavit of service by mail thereof.

Dated this 27th day of February, 1951.

/s/ HARRY L. OLSON,
Of Counsel for defendant-
appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed Feb. 27, 1951.

[Title of District Court and Cause.]

STATEMENT OF POINTS

Comes now the defendant above named as appellant and sets forth the following statement of points upon which he intends to rely on appeal:

1. The court erred in denying defendant's mo-

tion for judgment of acquittal made at the close of the evidence offered by the Government.

2. The court erred in denying defendant's motion for acquittal made at the close of all of the evidence.

3. The court erred in unduly restricting the cross-examination of Elaine Elliott in that:

(a) The court should have permitted the defendant to use identifications 5, 6 and 7, being letters written by the witness Elaine Elliott, to show that said witness was shortly before meeting Thomas T. Chamales, Jr., in such a state of love with her then brother-in-law, Bobbie Elliott, that her testimony on the stand in this case that she was in love with the defendant at first sight was false.

(b) The court should have received in evidence defendant's identifications 5, 6, 7, 9 and 10 for the purpose of affecting or testing the credibility of Elaine Elliott, and for the purpose of showing moral delinquency on the part of Elaine Elliott affecting her credibility.

(c) The court should have received in evidence defendant's identifications 5, 6 and 7 and permitted in connection therewith the defendant to show in the cross-examination of Elaine Elliott that said Elaine Elliott had lied under oath with reference to the nature of a trip taken with her brother-in-law, Bobbie Elliott, such testimony being material as affecting the credibility of Elaine Elliott.

4. The court erred in permitting the United States Attorney in the cross-examination of the de-

fendant to ask and to require the defendant to answer questions as to the identity of Tex Reed.

5. The court erred in permitting the witness Warsham, an FBI Agent, to testify over defendant's objection as to admissions claimed to have been made by the defendant.

6. The court erred in excluding the testimony offered by the defendant as to his need of psychiatric and other medical treatment, and as to the history of the medical and psychiatric treatment received by the defendant subsequent to his discharge from military service and up to the date of trial.

7. The court erred in charging the jury, and in refusing to charge the jury as requested.

8. The court erred in refusing to admit defendant's identifications numbered 2, 3 and 8.

9. That the defendant was prevented from having a fair trial due to the United States Attorney in his closing argument to the jury having read in question and answer form the testimony of a government witness, Betty DesCorreau.

10. The court erred in denying defendant's motion for a new trial.

Dated this fifth day of February, 1951.

/s/ HARRY L. OLSON,
Of Counsel for defendant-
appellant.

[Endorsed]: Filed Feb. 6, 1951.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
RECORD ON APPEAL

It appearing to the Court that the transcript of the testimony in the above entitled cause was not filed with the Clerk until February 26, 1951, and that sufficient time does not remain to permit the Clerk to transmit the record on appeal in said cause so that it may be docketed in the United States Court of Appeals on a before forty days from the entry of the notice of appeal, now, therefore, it is hereby

Ordered that the time for filing and docketing the appeal in the United States Court of Appeals be and the same is hereby extended for ten (10) days.

Dated this 27th day of February, 1951.

/s/ SAM M. DRIVER,

United States District Judge.

[Endorsed]: Filed Feb. 27, 1951.

United States District Court, Eastern District of
Washington, Northern Division
No. C-8117

UNITED STATES OF AMERICA,
Plaintiff,

vs.

THOMAS T. CHAMALES, JR.,
Defendant.

Before Honorable Sam M. Driver, United States
District Judge.

Appearances:

For the Plaintiff:

FRANK R. FREEMAN,
Assistant United States Attorney, of
Spokane, Washington.

For the Defendant:

HARRY L. OLSON,
Of Yakima, Washington.
JOHN WM. McARDLE,
Of Yakima, Washington.
GEORGE D. CROWLEY,
Of Chicago, Illinois.

RECORD OF PROCEEDINGS AT THE TRIAL

Be It Remembered that the above-entitled cause came on for trial at Spokane, Washington, on Tuesday, the 9th day of January, 1951, before the Hon-

orable Sam M. Driver, Judge of the above-entitled Court, sitting with a jury; the plaintiff being represented by Frank R. Freeman, Assistant United States Attorney for the Eastern District of Washington, of Spokane, Washington; the defendant being personally present and represented by his counsel, Harry L. Olson and John Wm. McArdle, of Yakima, Washington, and George D. Crowley, of Chicago, Illinois; whereupon, the following proceedings were had and done, to wit:

Mr. Olson: Your Honor please, I would like to introduce to the Court Mr. George D. Crowley, an attorney from Chicago, Illinois, and move that he be admitted for the purpose of associating with me in connection with this case. For the Court's information, Mr. Crowley is the defendant's brother-in-law.

The Court: Well, he may participate as an attorney in this case without general admission, and be considered admitted for all purposes in connection with this case.

Mr. Olson: Yes, I'd like to have the record show he's associated with me.

The Court: Yes, the record may show that. United States against Chamales.

Mr. Freeman: Ready, your Honor.

The Court: Is the defendant ready?

Mr. Olson: Yes.

The Court: The Clerk informs me that the record doesn't show that there has been any arraignment in this case. In view of the fact that you're here for trial I assume that you will enter a plea

of not guilty. To save time, will you waive the reading of the amended information and let the record show that a plea of not guilty is entered here, Mr. Olson?

Mr. Olson: The record may so show.

(Whereupon, a jury of twelve and one alternate juror were duly selected, empaneled and sworn to try the case.)

Mr. Olson: Your Honor please, as your Honor knows, I'm [2*] not the most experienced criminal lawyer in the world, but I want to invoke at the present time a motion to exclude the witnesses. I would prefer to have them excluded prior to the opening statement.

The Court: Well, you may make that motion now, or invoke the rule, rather, that witnesses be excluded. Do you wish to keep one witness?

Mr. Freeman: Yes, your Honor, Mr. Worsham. Mr. Clark, you will leave.

The Clerk: Wait a minute. The defendants haven't subpoenaed any through me. The following persons in the courtroom please rise: Carlisle Reed; Vicky Reed; Tom Dawson; A. L. Richmond; Wilbur R. Green; Evert Nelson; Elaine Elliott; Marge Mahoney; Betty DesCorrean; John W. Worsham; Eugene P. Clark. That's all the witnesses, your Honor, that I have any knowledge of.

(Of the foregoing witnesses whose names were read, the following were not present in the courtroom: Vicky Reed; Wilbur R. Green;

* Page numbering appearing at foot of page of original Reporter's Transcript of Record.

Evert Nelson; Elaine Elliott; Marge Mahoney;
Betty DesCorrean.)

The Court: This rule will apply to the defendant's witnesses as well as the government's, of course, and do you have any of your witnesses in the courtroom?

Mr. Olson: Just the defendant himself.

The Court: Very well. I'll say to you gentlemen you're [3] to be excluded here under the rule which counsel has the right to invoke, and that means that you're not to be in the courtroom here during the trial until after you've testified and both sides have excused you as a witness, and not only should you remain out of the courtroom, but you should refrain from discussing with other witnesses or prospective witnesses what your testimony is to be, or what it has been after you testify. When you testify and go out don't discuss what you've said with the other witnesses. The idea of the rule is to have the witnesses testify independently without knowledge of what the others said or will say. In order that you may not just have to wander around, there's a witness room down past the clerk's office, the bailiff will show you where it is, and if you wish to sit around there and while away the time playing canasta or something else you're perfectly welcome to do so, but you must remain out of the courtroom.

Mr. Olson: Your Honor please, the other witnesses who apparently are not here are the ones I'm particularly interested in having hear your Honor's instruction regarding that they should not discuss their testimony.

The Court: The gentleman who just came in, what is your name?

Mr. Nelson: Evert Nelson.

The Court: You're one of the witnesses in this case?

Mr. Nelson: Yes, sir. [4]

The Court: The rule has been invoked that the witnesses are to be excluded from the courtroom during the progress of the trial, and that means you must remain out of the courtroom until you have been excused by both sides; you're not to discuss with the other witnesses either before or after you testify what your testimony has been or will be, or what their testimony will be. You'll be called when you're needed as a witness. There's a witness room you can use for your convenience if you desire. Your other witnesses, of course I can't talk to them until they're here. If you'll let me know when your witnesses come I can instruct them in the same fashion.

Mr. Freeman: Our other witnesses are here, but they are not in the courtroom.

The Court: I see. All right, gentlemen, you may retire then. I will ask counsel on both sides if it should happen that you see one of your witnesses coming in, please stop and let me know and I'll instruct them. All right, proceed.

Plaintiff's Opening Statement

Mr. Freeman: If it please the Court, ladies and gentlemen of the jury: The principal purpose of my opening statement is to acquaint you to some extent with the evidence the government intends to

place on the witness stand in support of its information and charge in this particular case. I want to go through the evidence the government intends to [5] present to you as completely as possible so you may have a good criterion by which to gauge the case as it goes along and appraise the witnesses and follow the continuity of the government's case.

Now, as the Court told you, the government has charged Thomas T. Chamales, Jr., who is the gentleman sitting—Mr. Chamales, will you stand up—has charged Thomas T. Chamales, Jr. with two counts, two violations or alleged violations of the White Slave Traffic Act. The first count in substance charges that Thomas T. Chamales, Jr. on or about the 10th day of March, 1949, did transport and cause to be transported and aid and assist in transporting one Elaine Elliott from Chicago, Illinois, to Yakima, in the Southern Division of the Eastern District of Washington, for the purposes of prostitution, debauchery and other immoral purposes. Count two charges the same thing except that it charges a different date of transportation. It charges in substance that on or about the 14th day of August of 1949 Thomas T. Chamales, the defendant here, transported the same girl, Elaine Elliott, from Chicago to Yakima for the purposes of prostitution, debauchery and other immoral purposes.

Now, those two counts are based on, as I said, the White Slave Traffic Act, which reads as follows: "Whoever knowingly transports in interstate or foreign commerce or in the District of Columbia or any territory or possession of the [6] United States

any woman or girl for the purpose of prostitution or debauchery or for any other immoral purpose or with the intent and purpose to induce, entice or compel such woman or girl to become a prostitute or to give herself up to debauchery or to engage in any other immoral practice, or whoever knowingly procures or obtains any ticket or tickets or any form of transportation or evidence of the right thereto to be used by any woman or girl in interstate or foreign commerce or in the United States or any territory or possession of the United States in going to any place for the purpose of prostitution or debauchery or for any other immoral purpose or with the intent or purpose on the part of such person to induce, entice or compel her to give herself up to the practice of prostitution or to give herself up to debauchery or any other immoral practice whereby any such woman or girl shall be transported in interstate commerce shall be guilty."

So the charge in substance is that interstate transportation of a woman or girl for the purposes of prostitution or debauchery or immoral purposes. Now, the government intends to prove as follows:

The government will show you that Elaine Elliott on or about the date alleged in the first count, that is, March 10 of 1949, was a resident of Chicago, Illinois. I believe she was a dress model at that time. She will testify on the stand and go into those things thoroughly. About that date, [7] through a mutual friend, she met the defendant Thomas T. Chamales, Jr., in Chicago. They had several dates together. She became exceedingly fond of him, and

evidently to some extent at least he of her. The Elliott girl had been married already. She was separated, however, from her husband. Thomas T. Chamales was also married.

After a whirlwind courtship of three or four or five days Thomas T. Chamales, the evidence will show, told Miss Elliott that he could and would give her a job as a hostess in the Commercial Hotel in Yakima, a hotel I believe the evidence will show he was operating in Yakima at the time, a hostess in the dining room. She accepted the offer of a job at the Commercial Hotel as hostess. He procured, the evidence will show, railroad tickets for the transportation from Chicago, Illinois, to Yakima. When she arrived at the station she found that the tickets called for a single compartment on the Northern Pacific train to Yakima. The evidence will show that she objected to the single compartment, but since there were evidently no other accommodations available, she was forced to occupy the single compartment with him, and she had sexual intercourse with him from Chicago to Yakima.

At the Yakima Hotel the evidence will show Thomas T. Chamales procured a room or a suite, I believe he already had it, he was manager of the hotel, my understanding is, and the evidence will show he had this suite in the Commercial Hotel [8] at Yakima. For the first week of their stay in Yakima, at his suggestion and request or procurement she occupied the suite with him. The second week and the third week in Yakima the evidence will show that he procured a room for her separate

from his, upon her request and suggestion, but that he still enjoyed sexual intercourse with her during those three weeks in Yakima. The evidence will further show that the job offered her as hostess in the Commercial Hotel was not forthcoming. The evidence will show at the conclusion of the third week, as the result of the conduct of the defendant in this case, she refused to continue the relations further, and left for Chicago.

The evidence will show that very shortly after her return to Chicago telephone calls were exchanged between herself and Chamales in Yakima, I think two or three made by her and two or three made by him. The evidence will show of course that she was still enamored of Chamales. In any case, on or about the date alleged in the second count—what I have told you up to now concerns the first count. In any case, on the date alleged in the second count, on or about the 14th of August, 1949, the evidence will show that Tom Chamales put in a call to Elaine Elliott in Chicago and told her that he was sending \$125.00 for her fare for return to Yakima. He further told her, the evidence will show, that he was sending the \$125.00 to her roommate, Miss Marge Mahoney, who will testify here, [9] rather than to Miss Elliott because he said I believe the evidence will show that the F. B. I. was checking on him.

The evidence will further show that the \$125.00 was sent by Western Union telegram and the name Tom Chamales was not used in signing that money order; the name Tom Chambers was used, and

the money was sent from Tacoma. The evidence will show that Miss Mahoney with Miss Elliott went to the Western Union office in Chicago and procured the \$125.00 which Mr. Chamales wired. That same night Miss Elliott took the plane, I think the United Airlines, to Seattle. It was agreed by conversation between them that she would meet Chamales in Seattle and he would take her from Seattle to Yakima.

The evidence will show that on a Sunday night, I believe the Sunday following August 14, she arrived by plane in Seattle. She went to the Olympic Hotel, where by previous agreement with Tom T. Chamales she was to meet him. She did not find him there, and after waiting several hours the evidence will show that she went to the Earl Hotel, only a short distance away, and registered there under her true name, and that evening Tom Chamales came to the Earl Hotel. He had sexual intercourse with her that night.

The evidence will show that for the first time Tom T. Chamales that night at the Earl Hotel advised her that he had plans for putting her in a joint. The evidence will show that she was not sure of what he had in mind by the meaning "joint" [10] and upon further questioning that evening and the following morning was told unequivocally that he intended to place her in a house of prostitution. The evidence will further show that Tom T. Chamales then and there, the following morning, told her that he proposed to place her in a house of prostitution, one house of prostitution for several weeks, another

house of prostitution for another several weeks so that she would become familiar and pick up sufficient information and experience in working in a house of prostitution, and that he would then make her a madam or place her in charge of a house of prostitution operated by himself, I think he said, the evidence will show, someplace in Texas.

She remonstrated, the evidence will show. The evidence will further show that that afternoon in company with one Reed and Vicky Reed, husband and wife, and Chamales, Miss Elliott was taken by auto to Yakima. The evidence will show that the first night in Yakima they stayed at the Rest Haven Motel, where Mr. Chamales registered as a Richard Sullivan. The evidence will further show that that night he again mentioned the house of prostitution, and when she again refused to work for him or act in any such capacity, he struck her and used profane language. The evidence will further show that the next morning they returned to Seattle where she stayed at the Wilhard Hotel, and I believe he stayed in another hotel, but he still insisted on having sexual intercourse with her. The [11] second or third day in Seattle she became convinced that he was a pimp; she called the F.B.I., the evidence will show, and reported the story, the testimony which you will hear on the stand today, and returned to Chicago.

That in substance is the government's evidence which it will produce to you here today. We have the burden of proving the things that I've spoken and the charges as made in the information beyond

any and all reasonable doubt, and we intend to do just that.

The Court: You wish to reserve your statement?

Mr. Olson: We'll reserve it.

The Court: All right.

Mr. Freeman: Your Honor desires to start?

The Court: Well, I think it's a little late. I'll excuse the jury until 1:30—I think I'll excuse the jury until quarter to two, 1:45; I have some other matters that must be taken care of that can be done in the absence of the jury, matters not connected with this case, so you're to report back here at 1:45 this afternoon, and as you will be permitted to separate during this and other recesses and overnight adjournments I think I should tell you at this time that you shouldn't discuss this case among yourselves or with any outsider, and please refrain from reading any accounts of it in the newspaper or listening to accounts on the radio; you can listen to the other news, but just turn the radio off or [12] close your ears when it comes to this particular one, and don't read about it in the papers, because we want to be sure your verdict will be based entirely on the evidence you get in the courtroom and the court's instructions, and if anyone tries to talk to you about the case, just tell them you're a juror and can't talk about it; don't discuss it among yourselves, and by all means keep an open mind until you have heard all the evidence on both sides and the case is finally submitted to you. Now, the jury will be excused until 1:45.

(Whereupon, the following proceedings were had without the presence of the jury.)

The Court: I haven't recessed yet, I'm just excusing the jury. Did you have something to say, Mr. Olson?

Mr. Olson: I have some proposed instructions; it's been my practice in civil cases to immediately give them to the Court, if it's in order.

The Court: Yes, you may submit them now, and if you have additional instructions that may be suggested by an unexpected turn of the case you may submit supplemental instructions later, but I do appreciate getting them as soon as they're prepared.

Mr. Olson: I'll give counsel a copy of these.

The Court: This thought occurred to me, that as Mr. Olson suggested a while ago, I think the witnesses who were not to be brought into the courtroom until they testify should [13] be instructed the same as the others have been. I thought that could be done in the absence of the jury. Do you have three witnesses here who are not in the courtroom?

Mr. Freeman: Yes, your Honor.

The Court: I wonder if you'd have them brought in here so that I can instruct them? That's what you had in mind, was it not, Mr. Olson?

Mr. Olson: Yes, your Honor, they're the ones I'm primarily interested in.

(Whereupon, the three witnesses, Elaine Elliott, Marge Mahoney, and Betty Des Correau appeared in the courtroom.)

The Court: I just wish to say, you are all as I understand it subpoenaed as witnesses in this case, and the rule has been invoked that the witnesses be excluded from the courtroom during the trial, and that will apply to you as well as the others. In addition to remaining out of the courtroom during the time the trial is in progress, you should not discuss what your testimony is to be with the other witnesses, or after you have testified discuss with the other witnesses what you have testified. In other words, you're not to discuss with the other witnesses from this time forward, at any rate, what your testimony is to be, or what it has been after you testify, or what their testimony is to be or has been. The record will show who these three witnesses are.

Mr. Freeman: Elaine Elliott, Marge Mahoney, and Betty [14] Des Correau.

The Court: The record may show that the three just named are the ones I have just instructed with reference to the rule. This case will be suspended until 1:45.

(Noon recess.)

(All parties present as before, and the trial was resumed.)

(Whereupon, the following proceedings were had within the presence of the jury.)

ELAINE ELLIOTT

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Freeman:

Q. Will you give the Court and jury your name, please? A. Elaine Elliott.

Q. Elaine Elliott? A. Yes, two ells.

Q. And where do you reside now, Miss Elliott?

A. 462 Denway Place, Chicago.

Q. Chicago, Illinois; can you speak a little louder?

Mr. Olson: I didn't get that answer.

A. 462 Denway Place.

Q. Chicago, Illinois? A. Chicago.

Q. Miss Elliott, are you acquainted with Thomas T. Chamales, Jr.? A. Yes, I am. [15]

Q. Do you see him in the courtroom?

A. Yes.

Q. Sitting at the other table over here. Where and when did you first meet Thomas T. Chamales, Jr., Miss Elliott?

A. The first time I actually met him was at the Chicago Athletic Club.

Q. In Chicago? A. In Chicago, yes.

Q. And approximately when was that?

A. About six weeks before Easter in 1948.

Q. 1948 or 1949?

A. 1948 or 1949; '49, I believe.

Q. About six weeks before Easter in '49?

(Testimony of Elaine Elliott.)

A. Yes.

Q. And how did you happen to meet him in Chicago at that time?

A. Through a Mr. McDonald, who had called me earlier in the week and asked me if I could arrange to get a date for his friend who was coming in from Washington. However, Mr. McDonald had to go out of town, and Mr. Chamales, who was Mr. McDonald's friend, called me and asked me to have lunch with him.

Q. And you had lunch with him? A. Yes.

Q. How often did he see you during the course of the next [16] week or two weeks in Chicago?

A. Every night that he was there.

Q. Every night that he was there. What did he say to you with reference to his business, Miss Elliott, at that time?

A. Well, he explained to me that he was running—I don't believe he said managing, he said running his father's hotel in Yakima, but that his big business was with the Lustron Corporation, I believe he said he had the franchise of Lustron Homes in the State of Washington.

Q. Did he mention the hotel in Yakima by name?

A. No, I don't believe he mentioned it by name.

Q. At that time. Now, what was your employment at the time you first met him, Miss Elliott?

A. When I first met him I was free-lance modeling.

Q. Free-lance modeling? A. Yes.

(Testimony of Elaine Elliott.)

Q. Did you have any discussion with Mr. Chamales at that time about employment?

A. Yes, I did, because modeling was not good at the time, and I said I thought I would take a night job working in a checkroom, because the salary was quite good.

Q. And what if any rejoinder did he make to that?

A. Well, he said he didn't think I should work in a checkroom, that I would meet the wrong type of people in that [17] type of employment, and that he thought I was too nice to work in that sort of place.

Q. Did he offer you any employment?

A. He said that rather than see me go to work in a checkroom he would offer me a job, respectable job, out in Washington in the hotel where he was.

Q. In what type of work, did he say?

A. He said either in the dining room as a hostess, or I could take over Marian Roscoe's job as his secretary.

Q. Either as hostess or secretary?

A. Yes.

Q. Where?

A. In the Commercial Hotel in Yakima.

Q. In Yakima. Miss Elliott, approximately how many dates would you say you had with Thomas T. Chamales, Jr., in Chicago before you left for Yakima?

A. Oh, five to eight dates, I imagine.

Q. And what was the state of your affection

(Testimony of Elaine Elliott.)

toward Mr. Chamales at approximately the time you left for Yakima?

A. Well, it was more or less love at first sight.

Q. You were in love with him? A. Yes.

Q. Was he in love with you?

A. I don't know.

Q. What discussion did you have with Mr. Chamales with reference [18] to your transportation to Yakima for employment?

A. He said that he had a trip to make to Washington, D. C. and that when he was coming back that we could both go back to Yakima at the same time.

Q. And after he came back, when did you leave Chicago, then, after his return from Washington, D. C.?

A. About a month before Easter.

Q. About a month before Easter. You misunderstood my question. How many days after he left for Washington did the two of you leave, approximately after how many days after he left and came back from Washington did the two of you leave for Yakima? A. About two days.

Q. Now, who made arrangements for the transportation to Yakima, Washington?

A. He did.

Q. Now, tell the jury about that. Who purchased the tickets?

A. Tom purchased the tickets, and all I knew was that we were going on a train to the State of Washington.

(Testimony of Elaine Elliott.)

Q. And where did you meet him before you took the train?

A. My mother brought me down to see me off, and he requested that we meet him at the Glass Hat, at the Congress Hotel in Chicago.

Q. And you met him there? A. Yes. [19]

Q. And then where did you go?

A. From there we went to the train station.

Q. To the train? A. Yes.

Q. And that was the Northern Pacific?

A. Yes.

Q. And what accommodations did he have for you on the train?

A. He had a compartment, a bedroom compartment with two berths, upper and lower berth.

Q. In the single compartment? A. Yes.

Q. Did he have the tickets in his possession when he met you at the Green Hat, did you say?

A. Glass Hat.

Q. Glass Hat, did he have the tickets in his possession then? A. I believe so.

Q. Did you yourself have any money to purchase tickets? A. No.

Q. Did Mr. Chamales and you, Miss Elliott, indulge in sexual relations on the trip to Yakima?

A. Yes.

Q. At his suggestion?

A. Well, I don't believe anybody suggested it.

Q. What if anything did you say to him with reference to [20] the single compartment?

A. That I wasn't too happy about not knowing

(Testimony of Elaine Elliott.)

ahead of time so that I could have changed my plans if necessary.

Q. What did he say?

A. He said that he thought it was perfectly natural to have a compartment.

Q. Had you stated to him at that time your love or affection for him?

A. No, I don't believe so.

Q. Now, you arrived in Yakima approximately what date? First, Miss Elliott, did the two of you leave Chicago via the Northern Pacific Yakima? Can you place that date?

A. I don't know the exact date. It was about a month before Easter.

Q. Sometime in the early part of March, would that be approximately correct? A. Yes.

Q. Now, tell us what happened when you reached Yakima?

A. Well, we arrived either late in the night or early in the morning, I don't remember which, and we took a cab from the train station to the hotel, and there I was told that there was no room in the hotel for me, that I'd have to stay with him.

Q. And what hotel was that? [21]

A. The Commercial Hotel.

Q. And go ahead, tell the jury what happened then.

A. So I stayed in his suite at the hotel about five days to a week, and then I demanded an extra room for myself.

(Testimony of Elaine Elliott.)

Q. Did he have intercourse with you while you were staying in his room that week? A. Yes.

Q. Now, go ahead and tell us what happened then after you left his room.

A. Well, I had gone out with some friends of his one time when he didn't show up for a date that we had had, and the friends were of such low caliber that I came back to the hotel and wrote him a letter saying that I wanted immediate passage back to Chicago, that the whole thing was very disgusting.

Mr. Olson: Pardon me; you say you wrote him a letter? A. Yes, I did.

Mr. Olson: We object, your Honor, to her testifying to the contents of a letter.

The Court: She hasn't testified to the contents; she can say she wrote him a letter. I think objection has been made that it isn't the best evidence. Unless you can show the letter isn't available to her she shouldn't testify to the contents. [22]

Q. You can't go into the contents of the letter. Just tell what happened.

A. Well, I requested passage back to Chicago.

Mr. Olson: Was this orally? A. Yes.

Mr. Olson: Was this a conversation with Mr. Chamales?

A. The next morning, yes, and about four days after that I believe it was, I did go back to Chicago.

Q. (By Mr. Freeman): Well, now, let's get back to the hotel. You say you changed your room?

A. Yes.

(Testimony of Elaine Elliott.)

Q. From his suite to your own room?

A. Yes.

Q. And how long did you stay in your own room before you returned to Chicago?

A. About a week and a half or two weeks.

Q. So you were in Yakima altogether then somewhere between two and a half to three weeks?

A. That's right.

Q. Did he have sexual intercourse with you during the period you were in your own room, too, Miss Elliott?

A. Yes.

Q. Now, tell us about the employment that had been offered to you when you left Chicago.

A. Well, when we arrived in Yakima he informed me that the [23] dining room was leased to a man, and that he didn't have too much to do with the employment of the people who worked there, and also that I wasn't capable, didn't have the education, more or less, to do the secretarial job, which was quite a full time job, and I requested the job of a switchboard operator, since I knew that I could do that sort of thing, and he said no, I wouldn't be able to do that sort of a job, he said I wasn't dependable enough.

Q. So he offered you no employment?

A. That's right.

Q. Miss Elliott, let's go back to Chicago for a moment. To your knowledge what was Tom Chamales' marital status?

A. I believe he was in the process of being divorced at the time.

(Testimony of Elaine Elliott.)

Q. He told you he was married and was being divorced? A. Yes.

The Court: Just to keep the record straight, I think some mention was made of what was in that letter. The jury will disregard anything the witness has testified concerning the contents of the letter. That's a rule of evidence, that the letter is the best evidence.

Q. (By Mr. Freeman): What happened then after your two and a half to three week stay in Yakima, Miss Elliott?

A. Well, I left and went back to Chicago.

Q. Now, who paid your transportation? [24]

A. I believe he did.

Q. He paid it to you? A. Yes.

Q. Now, after you arrived back in Chicago did you again hear from Mr. Chamales?

A. I called him the day after I got back to Chicago.

Q. And what was the purpose of your call?

A. Well, I missed him, and I wanted to tell him so.

Q. You were still in love with him?

A. Very much so.

Q. On that first trip, Miss Elliott, was there any understanding or conversation between you and Thomas T. Chamales as to subsequent marriage on his divorce? A. No, none.

Q. Was there no understanding? A. No.

Q. Now, how many calls did you receive from

(Testimony of Elaine Elliott.)

Thomas T. Chamales in Chicago before you again came to Yakima? A. Two or three.

Q. And who made those calls?

A. Two or three he made, and I made several.

Q. And you made several?

A. I made several myself.

Q. And at that time as I understand it you were living with another young lady? [25]

A. Yes.

Q. In a common apartment? A. Yes.

Q. Who was that young lady?

A. Marge Mahoney.

Q. And where were you living then?

A. 7456 South Shore Drive.

Q. Chicago. Now, when did you next hear from Tom Chamales with reference to a return trip to Yakima?

A. I believe it was about the middle of July.

Q. July, '49? A. Yes.

Q. And tell us what occurred.

A. Well, he had called me and I wasn't at home, and I returned his call the next day and inquired what he had wanted, since I thought we were through as far as any association, and we talked again on the subject of my coming back.

Q. Now, what was the nature of that conversation? Can you give it to us to some extent?

A. I don't remember much about it except that we spoke of it, and he said that he thought it would be possible for me to come back in a short time.

Q. Well, during these five or six phone calls to

(Testimony of Elaine Elliott.)

Chamales did you express your love and affection to him, over the [26] phone?

Mr. Olson: That's objected to as being leading, your Honor.

The Court: Yes.

Q. What conversation if any did you have with Mr. Chamales with reference to your regard for him or he for you?

A. He knew from my phone calls and letters that I was very much in love with him.

Q. I can't understand you, Miss Elliott.

A. He knew from my phone calls and letters that I was very much in love with him.

Mr. Olson: I ask that that be stricken.

The Court: I think that is objectionable, and the jury will disregard it. That's a conclusion. What we want to know as nearly as you remember is what was said by him and by you that would indicate what your conclusion is.

Q. Did you so state to him? A. Yes, I did.

Q. Did he make a similar statement to you?

Mr. Olson: Now, if your Honor please, I think if they want to go into conversation——

The Court: Yes, I think you should try first to get the conversation if you can.

Mr. Freeman: Your Honor, there were five or six [27] phone calls two years ago; I'm sure she couldn't remember the crux of each one.

The Court: She couldn't remember the exact words, but she can state it as nearly as she can re-

(Testimony of Elaine Elliott.)

member, what was the substance of the conversations.

Q. (By Mr. Freeman): Well, Miss Elliott, when did he make the last phone call to you in Chicago?

A. The last phone call was about the 10th or 11th or 12th of August, in 1949.

Q. And what was the substance of that conversation?

A. He told me that definitely he was going to send me fare back to Yakima.

Q. To Yakima?

A. Or Seattle, and that he wanted to know whether I meant to stay for good this time, and I said yes.

Q. What do you mean by that?

Mr. Olson: Well, now, we object to that question, your Honor.

The Court: Yes, sustained.

Q. What else did he say to you, Miss Elliott?

A. Well, he told me that he was going to send me money for fare back, he was going to wire it in my roommate, Marge Mahoney's, name, and when I inquired about the reason for that he said that the FBI had been to him and warned him not to bring me out again, because I was a minor, and I [28] didn't quite understand what difference that would make in our private associations.

Mr. Olson: Now, I object, your Honor, to her comments on the thing.

(Testimony of Elaine Elliott.)

The Court: Yes, just say what he said and what you said as nearly as you can remember it.

Q. (By Mr. Freeman): Just go ahead and relate the conversation which you had with him on the subject, in addition to the \$125.00, he said he was sending, what was the balance of the conversation?

A. Well, he also asked me if I would be willing to work, and I said Yes, and he said "Are you sure?" and I said "Of course I'm willing to work" and so he told me that since everything was agreed upon, that it would be fine for me to come out.

Q. In that specific telephone conversation did he make any expression of his regard for you, Miss Elliott?

A. Yes, he said he needed me and that he wanted me out there.

Q. Did he send the \$125.00? A. Yes, he did.

Q. Tell us where and when you picked that up?

A. I believe it was on the 13th, my roommate and I, Marge Mahoney and I, had come home from seeing friends in Oak Park, and the young man that drove us home, we found the notice of the telegram when we got there, and we called [29] to find out where we could pick up the money, and it was in the Loop, so the young man who drove us home also drove up down to the Loop and then drove me out to the airport so I could catch the plane that night.

Q. How old are you now, Miss Elliott?

A. Twenty one.

(Testimony of Elaine Elliott.)

Q. And how old were you during the period you're now testifying about? A. Nineteen.

Q. Now, you picked up the money at the Western Union office, I understand? A. Yes.

Q. All right, what did you do then?

A. I went to the airport.

Q. Go ahead.

A. And I had a reservation, I had to take a reservation on United Airlines instead of the Northwest, as he expected me to, because I hadn't let them know ahead of time that I wanted space on the plane.

Q. Did you yourself see the telegram or money order that was sent to Marge Mahoney?

A. Yes, I did.

Q. What was the name of the sender in that telegram?

Mr. Olson: We object to it, your Honor——

Q. If you saw it. [30]

Mr. Olson: ——her testifying to the telegram; the telegram itself is the best evidence.

Mr. Freeman: We'll have the telegram here, your Honor.

The Court: Well, I'll sustain the objection, then, unless you can show the telegram isn't available.

Q. (By Mr. Freeman): All right, you took the United Airlines to Seattle, is that correct?

A. Yes.

Q. Traveling alone? A. Yes.

Q. Now, tell us what took place in Seattle upon your arrival there.

(Testimony of Elaine Elliott.)

A. Well, in our phone conversation he had told me he would have me registered at the Olympic Hotel under the name of Elaine Palmer.

Q. Did he explain that?

A. He connected it with the same reason he was sending the telegram to my roommate.

Q. You mean referring to the FBI?

A. Yes.

Q. I see. Tell us exactly what he said in that regard, Miss Elliott.

A. He said that he didn't want anybody to know that he was bringing me out, and that I shouldn't register under my [31] own name, but under the name of Elaine Palmer.

Q. All right, go ahead and tell us what happened after you arrived at the hotel.

A. I went to the Olympic Hotel from the airport and I inquired as to whether or not there was a registration for Elaine Elliott, and—or Elaine Palmer, and they said that there had been none, so I went out to the airport to see if he could be meeting the plane that I was supposed to have been on, which came in later, and he wasn't at the airport. I came back to town again, after leaving word at the airport that if anyone inquired about Elaine Elliott or Elaine Palmer that I would be at the Earl Hotel, which was down the street from the Olympic Hotel. I also left the same message with different ones at the Olympic in case he inquired of anybody about me.

(Testimony of Elaine Elliott.)

Q. Why did you stay at the Earl Hotel, Miss Elliott?

A. Well, the Olympic Hotel was filled, they had no rooms.

Q. Did you yourself then register at the Earl Hotel?

A. Yes, I did.

Q. Under what name?

A. Elaine Elliott.

Q. All right, tell us what happened then.

A. Well, I had given up on finding him myself, so I decided to stay in my room and let him find me, and about 8:30 or 9 o'clock in the evening he called from the lobby and [32] asked if he could come up.

Q. All right, now tell us what if any conversation you had with him at the Earl Hotel that night.

A. Well, just that we reviewed the past months and our feeling for each other.

Q. Was he affectionate toward you?

A. Very affectionate.

Q. Go ahead.

A. And he said he had made lots of plans for me, and I said "What sort of plans?" and he said "Oh, I've thought this over for months" and I said "What is it?" and he said "Well, I'm going to put you into a joint to work."

Q. Put you into what?

A. Into a joint, and I asked him further questions on it at the time.

Q. What did he mean by a joint?

A. I didn't know.

Mr. Olson: Object to that.

(Testimony of Elaine Elliott.)

The Court: Sustain the objection.

Q. Did he explain what he meant?

A. No.

Q. Did you ask for an explanation?

A. Not until the next morning.

Q. Where did you meet the next morning?

A. We went to the Richelean Cafe for breakfast.

Q. Did [33] he stay overnight at your hotel?

A. Yes.

Q. What happened the following morning?

A. The following morning I asked him what did he mean by a joint, and he told me it was a house of prostitution.

The Court: We'll take a five minute recess.

(Short recess.)

(All parties present as before, and the trial was resumed.)

(Whereupon, the reporter read the last previous question and answer.)

Q. (By Mr. Freeman): What other conversation did he have with you that morning, Miss Elliott?

A. Well, when he said a house of prostitution I said I would leave immediately, and he said why didn't I wait until he explained it to me. I said "What is there to explain?" He said "Well, you have to get to know the type of people that we're going to be dealing with if we're going to be together the rest of our lives, and I asked again what it was and he was going to put me in one house for four weeks and in another house for another four

(Testimony of Elaine Elliott.)

weeks and still another for another four weeks, and I would know enough to be able to have my own house in Texas where he said he planned on buying a franchise from the Chicago syndicate, from the rackets.

Q. What was your response to that, Miss Elliott?

A. I said I couldn't consider it, and that I would like to leave immediately, and he told me—did a complete change, and said "Oh, forget about it" as though it had been sort of a joke or something.

Q. Was there any other conversation had with him that morning?

A. Not except that he said we were going to go to Yakima in the afternoon.

Q. All right, what happened? Did you go to Yakima? A. Yes, we did.

Q. Who went to Yakima?

A. Tex Reed and Tom and myself went as far as I believe it was the town of Cle Elum, and there we picked up a girl by the name of Vicky Reed.

Q. Who is Tex Reed, if you know?

A. Tex Reed is a gambler.

Q. Was he a friend of Chamales'?

A. He's a very close friend of Tom.

Q. So in the drive to Yakima, did you drive by car? A. Yes, in Tex Reed's car.

Q. How many in the car?

A. Three until Cle Elum, and then four.

Q. Chamales, yourself, Tex Reed, and then Vicky Reed, his wife? [35] A. Yes.

(Testimony of Elaine Elliott.)

Q. All right, and when did you arrive in Yakima?

A. Early that—late that afternoon or early in the evening.

Q. That would be about three or four days or two or three days after you arrived in Seattle by plane?

A. Well, I believe I arrived on a Sunday, and it was a Monday that we arrived in Yakima.

Q. About the second week in August of '49, is that correct? A. Yes.

Q. All right, what did you do after you arrived in Yakima, where did you go?

A. Well, he took me in the back door to the Commercial Hotel, and when I inquired, he said well, he didn't want anybody to know I was there; he took me up to the room, and at that time of course I was quite hysterical and quite nervous from his having said what he did in the morning, and he gave me a phenobarbital so that I could get some sleep.

Q. Did you stay that night in the Yakima hotel?

A. Yes.

Q. All right, what happened then? Where did you go and what did you do?

A. Well, the next day he drove me to Marian and Ben Roscoe's to see their new baby.

Q. Now, who were they? [36]

A. Ben Roscoe was an employee of Tom's, I believe.

Q. At the Commercial Hotel?

(Testimony of Elaine Elliott.)

A. Well, connected with Lustron.

Q. And where did you spend the next night?

A. Well, he drove me to the Rest Haven Motel in Richard Sullivan's car.

Q. Is that a motel or a hotel?

A. It's a motel, I believe.

Q. And where is it at?

A. It's quite a ways out; it's not close to any business district or anything or any residence section; it's over a river.

Q. Out of where? A. Out of Yakima.

Q. Oh, out of Yakima. All right, who registered at the motel, if you know?

A. As far as I know he did.

Q. Do you know the name that he registered with or under?

A. Well, he told me that we were registered under the name of Richard Sullivan, because we had his car.

Q. Because you had Sullivan's car?

A. Yes.

Q. All right, tell us what took place at the Rest Haven Motel that night.

A. Well, we had been there about twenty minutes, and he told [37] me that he had to go back into town to get some things and that he was going to explain the whole business to me of what he wanted of me and what he wanted me to do, and that he was going to give me the time in which he was going back to town and would be back at the hotel again

(Testimony of Elaine Elliott.)

to decide for good and all if I wanted to go along with him.

Q. When did you next see him, then?

A. The next time I saw him was about a half hour or an hour after he left to go back to Yakima, and he came back, and he asked me what I was going to do, and I said that I couldn't, of course do anything like that, that I'd rather die than be one of what he wanted me to be, and he became quite angry with me, and so he threatened to leave, he said he was going to leave me there. I was very much frightened because it was very dark and it's a very lonesome spot, and I asked him why, and he used very profane language at me and told me that he couldn't stand to see me around, and then he slapped me across the face because I answered him back in some way, I don't remember how, and I became hysterical and he walked out and he was back in about five minutes and wanted to know what did I think I was going to do, and I said I didn't think it should worry him, and he decided then to stay, and he stayed and slept there in the evening, and [38] the next morning——

Q. How much money did you have in your possession at that time?

A. At that time I had about \$85.00.

Q. About \$85.00? A. Yes.

Q. All right, what happened the next day after the night you had stayed at the Rest Haven Motel?

A. He left early in the morning and went into Yakima, and I didn't know whether or not he was

(Testimony of Elaine Elliott.)

coming back or not; he said he would, but he was gone so long I walked down to the garage that was about a mile down the road, and I asked them if I could buy some cigarettes, and I came back, and in about fifteen minutes he had driven up with Richard Sullivan and they took me back to Seattle.

Q. Who is Richard Sullivan, Miss Elliott?

A. Richard Sullivan is a resident of Muskogee, I believe, or Chicago. I believe he's a broker in Chicago.

Q. Was he a friend of yours or a friend of Chamales'?

A. He's a friend of Mr. Chamales.

Q. All right, where did you go after you left the Rest Haven Motel? A. We went to Seattle.

Q. Now, who do you mean by we?

A. Richard Sullivan, Thomas Chamales and myself. [39]

Q. The three of you? A. Yes.

Q. When did you arrive in Seattle?

A. I believe it was early in the evening.

Q. All right, tell us what happened in Seattle.

A. Well, he told me to check out of the Earl Hotel and pay my bill and then check into the Wilhard Hotel, where he said I would be registered as Elaine Palmer.

Q. Now, who registered? Did you, or did he register for you? A. He registered for me.

Q. All right, go ahead, tell us what happened in the Wilhard Hotel.

A. I checked into the Wilhard Hotel and we

(Testimony of Elaine Elliott.)

went out in the evening, and he was bringing up the subject of the prostitution occasionally, telling me I'd have to go along with him and that he had to have me, and that he thought I needed him no matter what it was that we were doing.

Q. Where was he staying in Seattle, if you know?

A. I believe he stayed at the Caledonia.

Q. Now, how many days were you in Seattle after you arrived there before you called the FBI?

A. About ten days, I believe, a week or ten days.

Q. A week or ten days; now, how often did you see Chamales during that period? [40]

A. Well, I saw him about four nights, I believe, four or five nights after I got back to Seattle, and during that time he had spoken many times of our being together and how important it was and——

Q. Did you tell him you were going to leave him in Seattle?

A. Yes, after one night when we had gone to a restaurant and three men that he knew came into the restaurant, and were very polite and very nice to me, and one man had said something that was rather profane and he excused himself. Immediately afterwards Tom told a story that was extremely lewd and I was very much hurt that he would try to drag down the respect that others had for me by telling a story in front of me like that, and I went back to the hotel and I called the bus station to find out when the busses were leaving for Chicago, and he had told me to go back to the hotel,

(Testimony of Elaine Elliott.)

and when he came up later I told him that I was going to leave, I was going to take a bus and leave, and he said "Well, that's fine," and he said "Well, as long as I'm here may I stay," and I said yes, and he went to sleep immediately.

Q. Who paid the fare back to Chicago, your fare back to Chicago?

A. Two friends of mine helped me get back to Chicago.

Q. Chamales didn't give you the money for the trip back? A. No. [41]

Q. And I take it you called the Federal Bureau of Investigation shortly before you left for Chicago?

A. About three days, I believe.

Q. What was your purpose in calling the Federal Bureau of Investigation?

A. Well, Tom had gone back——

Mr. Olson: Now, if your Honor please, I don't think that's proper examination.

The Court: Yes; it might be redirect, but if the motive is gone into at this time I'll sustain the objection.

Mr. Freeman: I'll withdraw it, your Honor.

Q. (By Mr. Freeman): Have you seen Chamales since you arrived back in Chicago from Seattle? A. I have seen him, yes.

Q. Just occasionally?

A. Well, I have never spoken to him. I was in a restaurant one time when he walked in.

Q. I see; you have had nothing to do with him.

(Testimony of Elaine Elliott.)

I mean since you left Seattle and went back to Chicago? A. That's right.

Mr. Freeman: You may examine.

Cross-Examination

By Mr. Olson:

Q. You have been married, have you not?

A. Yes, I have. [42]

Q. And your husband's name is what?

A. Wright Andrew Elliott.

Q. You have subsequently been divorced from him? A. Yes.

Q. Now, when you first met Mr. Chamales that was in Chicago, as I understand it? A. Yes.

Q. And you say that he was introduced to you by a mutual friend?

A. Not exactly introduced, but recommended.

Q. Well, the introduction was arranged?

A. Yes.

Q. That was by Marty McDonald?

A. Martin McDonald, yes.

Q. Well, his name is Marty McDonald, isn't it?

A. I believe it's Martin.

Q. You never heard him called Marty McDonald?

A. I've heard him called Marty, yes.

Q. That's practically all anyone calls him, isn't it? A. I don't know.

Q. He is a—well, who is he?

A. I don't know just exactly what you mean by that.

Q. Well, you know him quite well, do you not?

(Testimony of Elaine Elliott.)

A. I didn't know him well, no. I had dated him once or twice.

Q. You had dated him once or twice? [43]

A. Yes.

Q. How long before you arranged the introduction with Mr. Chamales had you dated Marty McDonald, Miss Elliot?

A. Oh, about two or three weeks, I believe. I'm not sure of that date.

Q. Could it have been more than once or twice that you dated him?

A. No, I don't believe so.

Q. You don't believe so. Marty McDonald called you and told you that Mr. Chamales, Tom Chamales, was going to call you for a date?

A. No, he didn't.

Q. Pardon? A. No, he didn't.

Q. Well, what did he tell you?

A. He asked me if I would arrange a date for Mr. Chamales and we would double date.

Q. Well, did you arrange one for him?

A. I said at the time I didn't know anyone that I could introduce him to.

Q. And then when Tom Chamales called you he asked you for a date?

A. Yes, he told me that Marty was out of town and that he'd like me to go to lunch with him.

Q. And you accepted? [44] A. Yes, I did.

(Whereupon, photostatic copy of marriage license was marked Defendant's Exhibit No. 1 for identification.)

(Testimony of Elaine Elliott.)

Q. Showing you, Mrs. Elliot, the defendant's identification number 1, I'll ask you if you can state what that is?

A. It's a marriage license.

Q. And whose?

A. My husband's and mine.

Q. And also the certificate of your marriage?

A. Yes. I believe so.

Q. What is the date, by the way, that that shows that you and your husband Wright Elliot became married?

A. August 6th—no, August 7th, 1946.

Mr. Olson: We offer Defendant's identification 1 in evidence.

Mr. Freeman: I don't believe, your Honor, that it is relevant to any issue in this cause, and I object to it on that basis.

The Court: I fail to see the materiality of it.

Mr. Olson: I think it's very material, your Honor, to show this lady's marital status.

The Court: She says that she's been married.

Mr. Olson: Yes.

The Court: Well, I'll admit it; it's a matter of [45] record, she says she's been married. It will be admitted.

(Whereupon, Defendant's Exhibit No. 1 for identification was admitted in evidence.)

(Whereupon, certified copy of divorce complaint was marked Defendant's Exhibit No. 2 for identification.)

(Testimony of Elaine Elliott.)

(Whereupon, certified copy of divorce decree was marked Defendant's Exhibit No. 3 for identification.)

Mr. Olson: If your Honor please, at this time we offer in evidence defendant's identification 2 and defendant's identification 3, defendant's identification 2 being a certified copy of the complaint for divorce, and 3 being a certified copy of the decree of divorce in the divorce action.

Mr. Freeman: Your Honor, I object to both of them on the same grounds, that they're not relevant to any issue in this case.

The Court: Will the jury step out just a moment, please?

(Whereupon, the following proceedings were had without the presence of the jury.)

Mr. Freeman: If your Honor please, the only purpose it seems to me of——

The Court: I've glanced at the divorce complaint; it shows the grounds on which the complaint was based or [46] stated therein. I'll hear Mr. Olson on that.

Mr. Olson: Your Honor, certainly the decree is admissible, and the complaint——

The Court: I'm not so sure the decree is admissible. It isn't your contention, is it, that there's any difference between married and single women so far as the application of the White Slave Traffic law is concerned?

Mr. Olson: No, your Honor, but it has a great deal to do with the likelihood of the correctness——

(Testimony of Elaine Elliott.)

The Court: Likelihood of what?

Mr. Olson: The likelihood of the veracity, the correctness and truth of the testimony of the complaining witness.

The Court: That's a new one on me, if divorce proceedings affected the credibility of a witness a number of witnesses would be seriously limited, particularly in Hollywood.

Mr. Olson: That's not the purpose; when you show the marriage is before the transaction, and the divorce is after the transaction, it shows definitely the marital status of this witness at the time this transaction took place. I don't contend that the fact that the lady has been divorced, that that fact affects her credibility. What I'm attempting to show by the marriage certificate and by the decree of divorce is that at the time of this [47] transaction this lady was a married woman.

The Court: Well, I think you can show that, all right, but I don't believe the contents of these documents are admissible. If there's an allegation or even a finding, perhaps on default without her appearing, as to what her conduct may have been, I don't believe that's proof, even assuming it might be admissible here, it wouldn't be proper proof of the facts alleged in the complaint or perhaps shown in the decree. I think she has stated she was divorced. You may bring out when she was divorced, but I'll sustain the objection to these exhibits. Exception will be allowed to the defendant.

Bring in the jury.

(Testimony of Elaine Elliott.)

(Whereupon, the following proceedings were had within the presence of the jury.)

Cross-Examination

(Continued)

By Mr. Olson:

Q. Elaine Elliot, for the purpose of refreshing your recollection I'll hand you defendant's identification 2 and will ask you when the divorce action between you and your husband was instituted?

A. Do you mean when——

Q. When was it started?

A. When was it started?

Q. Yes, when was it commenced?

A. The 14th day of February, 1949. [48]

Q. 14th day of February, 1949? A. Yes.

Q. And handing you defendant's identification number 3 I'll ask you when, for the purpose of refreshing your recollection, what date you were divorced from your husband?

A. Actually on October 9, but it was dated October 2.

Mr. Freeman: Of what year, Miss Elliot?

A. Of 1950.

Q. So that you and your husband Wright Elliott were divorced in October of last year?

A. Yes.

Q. About three months ago? A. Yes.

Q. Then at the time of your meeting Mr. Cha-

(Testimony of Elaine Elliott.)

males and at the time of your trip, each of the two trips, you were married to Wright Elliott?

A. I was separated from Wright Elliott.

Q. But married to him? A. Yes.

Q. Now, when you met Tom where did you meet him in Chicago, whereabouts?

A. I met him for lunch at the Chicago Athletic Club.

Q. And that was pursuant to the phone call that you had with him? [49] A. Yes.

Q. Now, what took place on that occasion?

A. We went to the dining room and had lunch and sat and talked for quite a while, I believe almost three hours.

Q. Where was it, in the bar, or the dining room, or whereabouts? A. In the dining room.

Q. You met in the dining room about what time?

A. We didn't meet in the dining room; we met in the lobby.

Q. You met in the lobby? A. Yes.

Q. And how did you know who he was and how did he know who you were?

A. He said the doorman would point him out.

Q. Pardon?

A. He had let the doorman know I was expected; the doorman would introduce us or bring us together.

Q. Were you known by the doorman?

A. No.

Q. I still don't understand——

A. I inquired of the doorman if there was a Mr.

(Testimony of Elaine Elliott.)

Thomas Chamales in the lobby waiting for someone, and he said yes, and took me over there to him.

Q. Now, this hotel in Chicago is quite a large hotel, or a large club, is it not? [50]

A. I believe so. I don't know very much about it.

Q. Are there a number of ladies that come in and out?

A. There's one entrance for ladies. They're not allowed any place but in the dining rooms and some of the cocktail lounges, and the ladies' visiting room or visitors room.

Q. Did the doorman know you when you got there?

A. No, but I told him I was the guest of a member.

Q. Anyhow, you met Mr. Chamales there in the lobby and then you went direct to the dining room?

A. Yes.

Q. And had lunch? A. Yes.

Q. Did you have anything to drink there?

A. Not that I recall, no.

Q. Then when you and Mr. Chamales had lunch you say you conferred back and forth about three hours? A. Yes.

Q. And what time of the day, approximately, was it?

A. Well, early in the afternoon, going into late afternoon.

Q. Pardon?

A. Early afternoon going into late afternoon.

(Testimony of Elaine Elliott.)

Q. Well, do you recall about what time it was you met him? A. No, I don't.

Q. Whether it was 1 o'clock or 2 o'clock? [51]

A. No, I don't.

Q. And what was your conversation there that you had with him?

A. We spoke of many things, our marital positions and a little bit of psychology, a little bit of news about everything.

Q. Now, you say that you fell in love with him at first sight, as I understood you, is that right?

A. That's right.

Q. And by that you mean you fell in love with him that afternoon? A. Yes, sir.

Q. Did you tell him so? A. No, sir.

Q. Did he indicate that he was in love with you?

A. No, sir.

Q. Was it even discussed or mentioned?

A. No.

Q. Or referred to? A. No.

Q. You then met that afternoon, as I understand it you fell in love with him, but your conversation was more or less general conversation?

A. That's right.

Q. At that time he told you—was it at this conversation [52] that he told you of his connection with the Lustron Company?

A. I don't remember which evening it was.

Q. And did he tell you of any connection with the hotel?

(Testimony of Elaine Elliott.)

A. I don't remember when he said it; he did tell me at one time.

Q. While you were dating in Chicago? Was that before you left Chicago that he told you that?

A. Yes, I believe so.

Q. Did you gain the impression from those conferences that he was a very wealthy man?

A. I gained the impression that his father was very wealthy.

Q. Did he use big figures in his conversations with you?

A. Not particularly. He had great plans and hopes for the Lustron Company and the money that he might be able to make some day.

Q. Did he indicate how much he was going to make off of the Lustron Company?

A. I don't remember if he ever said.

Q. Have you any recollection on that, as to what he indicated?

A. No, I don't. The way I understood it, it was a great big chance that he was taking, and he wasn't sure he'd get anything out of it.

Q. What did he say? Do you remember anything about his [53] conversation about the Lustron Corporation?

A. Well, he told me that they were trying to get the franchise, or they had the franchise, they were trying to get the contract to build Lustron homes for the Richland project.

Q. Did he indicate to you that if he got that

(Testimony of Elaine Elliott.)

contract, and having this franchise, that he was going to make a million dollars?

A. No. He was quite honest about it, that it might never work out.

Q. But that if it did, that it would bring a lot of money?

A. I believe it would. I don't know. I didn't know anything about the situation except that he was in this deal and was quite excited about it.

Q. He also indicated to you that his father was very wealthy, is that correct?

A. Yes, he said his father was retired.

Q. And did he tell you about the hotel, the Commercial Hotel that his father operated in Yakima?

A. He didn't tell me much about it until we spoke of my being employed there.

Q. You don't recall any discussion of it on the first meeting with Mr. Chamales?

A. No, I don't recall it; there could have been, but I don't recall it. [54]

Q. The matter of your employment wasn't discussed the first meeting with Mr. Chamales?

A. No.

Q. Well, then, what time did Mr. Chamales take you home? A. I don't remember.

Q. Do you know whether it was before dinner that day?

A. I really can't say, I don't remember it well enough, but I don't think I had a date with him in the evening; I believe it was just an afternoon date.

(Testimony of Elaine Elliott.)

Q. Mr. Chamales' treatment of you was entirely proper in every respect?

A. Extremely proper.

Q. Extremely so? A. Yes.

Q. He was polite? A. Very polite.

Q. Courteous? A. Very courteous.

Q. Made no advance—— A. No.

Q. ——of any kind? A. None.

Q. Referred to none? A. No.

Q. And when did you see him again? [55]

A. The next evening, I believe.

Q. Did you ask him to call you again?

A. No, I didn't.

Q. Where did you see him the next evening?

A. I don't remember where we went. He picked me up at the place where I was living, and we went out. I can't say exactly where we went. I know that we did go to a number of places in Chicago during the time we were dating there.

Q. Can you give me any idea of the time other than so many weeks before Easter? Can you give me any idea of the time at all?

A. I can't give you exact dates.

Q. Can you give us approximate dates?

A. As close as I can come, to my recollection it was about six weeks before Easter that I met him.

Q. What month would that be?

A. February or March.

Q. Do you know whether it was February or whether it was March? A. No, I don't.

Q. You're sure it was 1949?

(Testimony of Elaine Elliott.)

A. I'm pretty sure. Everything happened in the same year, and I was very sure it was 1949, later.

Q. Well, then, you're not sure when you first met him whether it was the latter part of February or the early part of [56] March?

A. No, I'm not.

Q. And then you think you saw him the next evening?

A. Yes, I believe so.

Q. You don't remember where?

A. I don't remember where we went.

Q. You don't remember whether it was a dinner date or not?

A. Yes, it was a dinner date.

Q. And where did you have dinner?

A. As close as I can remember it was either the Ivanhoe or——

Q. Pardon?

A. I think it could have been the Ivanhoe. I don't remember exactly.

Q. What was the nature of that meeting with Mr. Chamales?

A. Merely a date.

Q. Did you go any place besides for dinner?

A. I really don't recall right now.

Q. Where were you then living?

A. With the same place my mother was, in Austin.

Q. Pardon?

A. I was living in the same home as my mother in Austin.

Q. You and your husband had lived together with your mother, had you not, at the same place?

A. No.

(Testimony of Elaine Elliott.)

Q. With your grandmother? [57]

A. Grandmother.

Q. Had you moved from the place where you and your husband had been living?

A. Oh, yes.

Q. And had moved from your grandmother's place where you and your husband had lived together, to your mother's place?

A. That's right.

Q. And you and your husband Wright Elliott had a child, did you not? A. That's right.

Q. And when you left did Wright Elliott stay at your grandmother's place?

A. I left both he and the child.

Q. You left both your husband and child at your grandmother's place? A. Yes.

Q. Well, now, on this second trip was there anything—how did Tom treat you on the second trip, your second meeting, how did Tom treat you on that trip?

A. The same way as the first, very proper.

Q. Very proper? A. Yes.

Q. Very courteous to you? A. Yes. [58]

Q. Very polite? A. Extremely so.

Q. And he didn't mention being in love with you? A. No, he mentioned that he was——

Q. Pardon?

A. ——that he was very happy to be with me.

Q. Did he make any advances to you of any kind? A. No.

Q. Is it possible. Mrs. Elliott, that there could

(Testimony of Elaine Elliott.)

be a couple of days in between the first meeting and the second meeting?

A. It may be; I don't remember that closely, just when it was.

Q. In other words, you're not positive that after seeing you the first afternoon, that he again had a date with you the next night or next evening?

A. I'm almost positive.

Q. Well, is it possible that there was a couple of days in between?

A. Anything could be possible; I don't remember.

Q. Well, then, when did you next see Mr. Chamales?

A. I believe I saw him, from the first day that we met at the Athletic Club, I saw him continuously every evening until he went to Washington, D.C., as far as I recall.

Q. Well, where did you go, if you saw him that many times? [59]

A. Went to a great many places; went to the Yar, as a special favor to me because I had never been there.

Q. To the Yar?

A. To the Yar Restaurant.

Q. Do you remember which one of the dates with him that was? A. No, I don't.

Q. Do you remember going to this Dick Sullivan's place for dinner?

A. Yes, we did; we had turkey dinner at Dick Sullivan's.

(Testimony of Elaine Elliott.)

Q. Dick Sullivan is about how old?

A. I don't know.

Q. He's married? A. Yes.

Q. Has three children?

A. Two or three children.

Q. Two or three children; and when Mr. Chamales took you to his place it was at his home?

A. Yes.

Q. His wife was there? A. Yes.

Q. His family were there? A. Yes.

Q. And he simply took you there for dinner with the Sullivan family? A. That's right. [60]

Q. Mr. Sullivan being a friend of Mr. Chamales?

A. That's right.

Q. And is it not possible that that was the second time that you met Tom, that you went to the Sullivan place for dinner?

A. Could be possible, but I don't recall which day it was.

Q. You wouldn't say that it wasn't?

A. I wouldn't say that it wasn't; I wouldn't say either way.

Q. You just can't tell us in any chronological order where you met Mr. Chamales or what particularly transpired on any of those occasions?

A. Well, I can tell you that we went to I believe two plays; we had dinner; we went up to Mr. Crowley and Tom's sister's apartment one time before a play.

Q. Mr. Crowley, that's the gentleman sitting right behind me? A. Yes, sir.

(Testimony of Elaine Elliott.)

Q. He's married to Mr. Chamales' sister?

A. Yes, sir.

Q. And on one of the occasions that you were out with Mr. Chamales he took you up to his sister and brother-in-law's place? A. Yes, sir.

Q. And was there any advance or any improper conduct on the part of Mr. Chamales at that time?

A. Mr. Chamales treated me very fine all the time we were in [61] Chicago.

Q. In other words, as I understand it then, the entire meetings that you had with Mr. Chamales, irrespective of whether there were a lot or a few or whatever there was, his treatment toward you was one of utmost propriety? A. Exactly.

Q. He never made any improper advances to you, either conversation-wise or by actions of any kind? A. No, sir.

Q. As I understand it, it is your testimony and it is the fact that all the time that you were in Chicago prior to this first trip and prior to getting on the train, that Mr. Chamales never by word or by action or otherwise made any improper advances toward you in any way? A. That is correct.

Q. Did he during any of that time ever kiss you?

A. Yes, he always kissed me good night.

Q. Did he do that on the first afternoon?

A. No, I don't believe so.

Q. How long after you had met him did he kiss you good night? A. I really couldn't say.

Q. Do you think it was a week?

Mr. Freeman: Your Honor please, I can't see

(Testimony of Elaine Elliott.)

the materiality of this line of questioning. I grant you this is cross-examination, but whether he kissed her the first [62] or second night or the third night——

The Court: Well, I'll overrule the objection.

Q. You can't say, is that right?

A. That's right.

Q. Now, do you remember, Mrs. Elliott, where you were or when it was that the topic of your coming out to Yakima to work in the hotel was first discussed?

A. I believe it was at the Yar.

Q. How do you spell that? A. Y-a-r.

Q. Now, how long before you actually came out to Yakima was that?

A. About a week, I believe; maybe more, maybe less.

Q. How long was it between the time you first met Mr. Chamales until you left Chicago to come to Yakima with him? A. About two weeks.

Q. About two weeks? A. Yes.

Q. So then it was about half way between the period that elapsed from the time that you met him until you left Yakima that you first discussed with him making a trip out to Yakima?

A. I'm sorry, that's a little too confusing.

Q. Well, I don't want to confuse you. From the first time [63] you first met Mr. Chamales until you got on the train to come to Yakima was approximately two weeks? A. Yes.

Q. And it was about half way in between, or

(Testimony of Elaine Elliott.)

approximately one week before you came, that you first discussed the possibility of your coming to Yakima, or did I misunderstand you?

A. I don't know. You mean—well, it was about a week or ten days after I met him that we discussed my working in Washington, in Yakima. That's as close as I can get to what I think you're trying to arrive at.

Q. Now, who brought the subject up?

A. Well, I just happened to mention that I was going to get a night job in a checkroom because I had known some girls who had done it and they said it was very good pay and it was not extremely hard work, and it was fun to see the celebrities and things like that, and I said that I thought I'd like to do it for a while.

Q. Were you then unemployed?

A. I was free lancing as a model.

Q. Just what does that mean?

A. Well, I do photography work and had done radio and television—not at the time I hadn't done television, but I have since then, and fashion shows and more or less secretarial work at conventions, or handing out the [64] pamphlets and things like that.

Q. How do you get that kind of a job?

A. How do I get the work?

Q. Yes.

A. Through an agency, the Pat Stevens Agency.

Q. Through what?

A. The Patricia Stevens Model Agency.

(Testimony of Elaine Elliott.)

Q. The Patricia Stevens Model Agency?

A. Yes, Model Bureau.

Q. Were you working for Patricia Stevens?

A. I was working with them as an agent with the agency as the—well, I don't know how best I can explain it. It's an agency where the clients call them up, and they call us up, and they get 10 per cent of whatever the clients pay us.

Q. Well you brought up the subject then with Mr. Chamales that you were thinking about taking a job as a hat check girl? A. Yes.

Q. You have worked at that, as I understand it?

A. Now I have. I hadn't at the time.

Q. You hadn't at the time, but you have since, is that right? A. Yes.

Q. Then during this conversation which was a week or ten [65] days after you met Mr. Chamales you discussed about coming out to Yakima to work in the Hotel, the Commercial Hotel in Yakima?

A. Yes, when he objected to my working at nights.

Q. And that was in the capacity of either a hostess in the dining room—

A. The dining room.

Q. —or as a secretary at the hotel, Mr. Chamales' secretary?

A. As secretary to Mr. Chamales for the Lustron business transactions.

Q. Did he indicate to you that his business transactions with the Lustron Corporation had

(Testimony of Elaine Elliott.)

reached the stage where he required the services of a secretary?

A. He had the services of a secretary, which however was pregnant, and he didn't believe, according to what he told me, that she would be able to keep on working for him.

Q. The secretary was going to have to cease her job? A. Yes.

Q. And the possibility was discussed of your taking her place? A. Yes.

Q. So that when you and Mr. Chamales discussed the matter that was the purpose for which you were to come to Yakima?

A. That's right.

Q. And then when you made the trip or got ready to make the trip your mother came with you clear to the train, did she? [66]

A. I don't remember whether she came to the train, or we left—yes, I believe she did, she came with us to the train station. Not to the train itself, but to the train station.

Q. Now, this Glass Hat that you talk about, where is that?

A. That's in the Congress Hotel.

Q. In Chicago? A. Yes.

Q. Did you meet Mr. Chamales there?

A. Yes, my mother and I met him there, and Mr. Roscoe, Ben Roscoe.

Q. You say you're almost sure you were with Mr. Chamales every night after you met him. I

(Testimony of Elaine Elliott.)

take it then he didn't make any trip to Washington?

A. I said except for the time he was in Washington, D. C.

Q. How long was he in Washington?

A. I have no idea now. I don't believe it was over two or three days that he left.

Q. Then when you got on the train did you discuss the method of your transportation at all, to Yakima?

A. He had asked me ahead of time whether or not I wanted to fly out or whether I wanted to take the train, and I said I had never flown, and I would feel much safer taking the train.

Q. But whether you traveled in one compartment or whether you [67] wouldn't, you never discussed that? A. Not that I remember.

Q. Well, is it possible that you would have discussed that and not remembered it?

A. I don't remember anything about it now.

Q. Well, would you say that it was or was not discussed?

A. I don't think it was. I never would have gone if I had realized we were going to be in the same compartment.

Q. Then you'd say it never was discussed?

A. Yes.

Q. Pardon? A. I would say that.

Q. What did you do when you first got on the train?

A. I believe we went to the lounge car.

(Testimony of Elaine Elliott.)

Q. Did you have your luggage with you?

A. I don't remember what happened to the luggage. I imagine it was taken from us by a porter.

Q. Do you remember? I don't care to have you imagine, Miss Elliott.

A. No, I don't remember.

Q. Did you go directly to this compartment?

A. Not that I know of; I think we went to the lounge car.

Q. Is that where the bar is? A. Yes.

Q. And did you then have some drinks [68] there? A. Yes.

Q. And what time did you retire to your compartment on the train?

A. We didn't stay in the lounge very long. I believe it was ten or fifteen minutes after the train started.

Q. What time was it when you boarded the train? Was that in the morning or afternoon?

A. It was evening.

Q. Then after ten or fifteen minutes you retired to your compartment? A. Yes.

Q. And was that the first time that you realized that you were occupying one compartment?

A. Yes, it is.

Q. What did you say?

Mr. Freeman: She said yes.

Q. No, I mean what did she say then.

A. I don't remember what I said in exact words. I know I wasn't extremely happy about it.

Q. Were you unhappy about it?

(Testimony of Elaine Elliott.)

A. My feelings for Mr. Chamales were so that I wasn't very unhappy about it, no.

Q. Was the train then moving? A. Yes.

Q. And do you know what is the next city you reach after you [69] leave Chicago on the way out?

A. You mean where did I get off, or what city did they stop at?

Q. What is the next city of any consequence the train goes through and stops at?

A. I have no idea. I don't even know if the train stopped.

Q. I didn't mean to interrupt. Did you make any effort to get off the train at all? A. No.

Q. Now, you say there were two berths in this compartment? A. Yes.

Q. An upper and a lower? A. Yes.

Q. And did you and Mr. Chamales occupy a single berth? A. Part of the time.

Q. And I understand you to say that wasn't particularly at his suggestion or at your suggestion?

A. No; he seemed to expect it then.

Q. Huh? A. He seemed to expect it.

Q. Well, what did you expect, or did you have any expectations?

A. I was content to let it go as it was.

Q. The arrangement was one that was entirely satisfactory with you? [70]

A. Not entirely, no, but I didn't want to argue with him; I was too fond of him.

Q. Did you protest in any respect at all?

A. I believe I did.

(Testimony of Elaine Elliott.)

Q. If so, what did you do?

A. I don't believe I did anything.

Q. What did you say?

A. Well, I was rather surprised to find that we had a compartment.

Q. Pardon?

A. I just said that I was rather surprised to find that we had a compartment.

Q. You entered the compartment with Mr. Chamales, however, and stayed there?

A. I did.

Q. You were not forced to at all? Your answer is no? A. No.

Q. Well, now, how long then were you on the train coming out to Yakima?

A. Two and a half or three days, I believe.

Q. And you continued to occupy that compartment all the way out? A. Yes, sir.

Q. You never complained to the porter or conductor? A. No, sir. [71]

Q. You never. The train stopped many times, I suppose, coming along on the trip?

A. I don't know; I didn't count whether the train stopped or not.

Q. It wasn't a through train from Chicago to Yakima? A. I don't know if it was or not.

Q. You mean you can't tell us whether or not the train ever stopped?

A. I wasn't quite interested in whether or not the train was stopping.

(Testimony of Elaine Elliott.)

Q. You say you weren't quite interested in that?

A. No.

Q. What were you interested in?

A. Mr. Chamales.

Q. So that your interest in him then was to such an extent that you're not sure whether the train ever stopped even once, is that right?

A. That's right.

Q. From the time you left Chicago until the time it arrived in Yakima, is that true?

A. That's right.

Q. I take it then you had no objections whatever to Mr. Chamales' treatment of you on that trip?

A. Well, you can't very well undo something that's already done. [72]

Q. Well, did your sexual relations with him continue throughout the trip out? A. Yes.

Q. Now, had you at that time yet advised him that you were married? A. Yes.

Q. Then you arrived in Yakima in the night sometime, as I understand, either late night or early morning? A. Yes.

Q. And you immediately went to the hotel, is that right? A. Commercial Hotel.

Q. The Commercial Hotel? A. Yes.

Q. Now, you had by that time, as I understand it, occupied the same compartment for two and a half days with Mr. Chamales? A. Yes.

Q. And was there any question of your knowing then when you got to the Commercial Hotel as to

(Testimony of Elaine Elliott.)

whether you were going to occupy the same room with him or not?

A. Yes, I thought I should have my own room.

Q. But he took you into his quarters there?

A. Yes, he said there was no other room for me.

Q. That's the manager's living quarters there at the hotel, is it not? [73]

A. As far as I know.

Q. Now, his father and mother who owned the hotel were not there?

A. Who?

Q. Mr. Chamales' father and mother, Tom Chamales, Sr., and his wife; in other words, Tom's father and mother, were not at the hotel?

A. I never saw them.

Q. When you arrived the first time?

A. I never saw them.

Q. Well, as a matter of fact, they just weren't in town at all?

A. I don't know. I didn't see them; that's as far as I know.

Q. Well, you were at the hotel how long on the first trip? Two weeks? Three weeks?

A. Two to three weeks. I don't recall exactly.

Q. And yet you can't state whether or not Mr. and Mrs. Chamales, Sr., were in Yakima or not?

A. Well, it could be very possible that they were there and I didn't see them. However, he told me they were not there and I believed him, but whether they were actually there I don't know.

Q. Then your information was that they weren't there?

A. That's right.

Q. Then you stayed in the room with Mr.

(Testimony of Elaine Elliott.)

Chamales for how [74] long, when you occupied the same room?

A. Approximately five days to a week.

Q. Can you give us any idea what time that was?

A. Do you mean the date?

Q. Yes. A. No, I can't.

Q. Can you tell us the room number?

A. I believe it was 301, or something like that.

Q. Is the room designated by any other name?

A. The Blue Room.

Q. The Blue Room? A. Yes.

Q. That is 501, isn't it, in the hotel?

A. What?

Q. Isn't it 501?

A. I really don't recall now.

Q. You don't know during these three weeks you were there whether you went to the third floor or the fifth floor? A. I don't remember now.

Q. You don't remember. You went to that room several times a day, I suppose, for a period of three weeks? A. Yes.

Q. Then when you moved to your own room, where was that with reference to this Blue Room?

A. It was about two rooms down the hall. [75]

Q. The same floor? A. Yes.

Q. And you stayed there, then, the rest of your stay in Yakima? A. Yes.

Q. Well, now, what was it that—during that time did Mr. Chamales and you sleep together every night? A. No.

Q. Just on occasions? A. Yes.

Q. And how did you get along while you were

(Testimony of Elaine Elliott.)

out there, then? A. We fought constantly.

Q. You began to fight after you got out in Yakima? A. Yes.

Q. When did that first start after you got out there?

A. Well, about three days after I got out.

Q. About three days afterwards. Do you remember what you started to fight about? A. Yes.

Q. What was it?

A. I was supposed to be sexually inhibited.

Q. Your sexual relations with him were not satisfactory, is that what you mean?

A. Not to him, no.

Q. So you started to quarrel about that? [76]

A. Yes.

Q. And did your quarreling continue for this next two to three week period?

A. Off and on, yes.

Q. And finally reached the point where you returned to Chicago? A. That's right.

Q. And it was because of your quarreling, because of your unsatisfactory sexual relationship, at least to him, that you returned to Chicago?

A. No, sir.

Q. Well, was it something else?

A. It was the whole thing, everything that happened, his friends, the situation, the way things were kept from me until it was too late; it was everything that happened in the whole trip that made me go back the first time.

Q. Well, had you then fallen out of love with him? A. I was still very much in love.

(Testimony of Elaine Elliott.)

Q. When you left you were still very much in love with him? A. Yes.

Q. And then he furnished you with the transportation back? A. As far as I know.

Q. Well, where did you get your ticket?

A. He told me that he was sending Ben Roscoe down to get the ticket, and Ben would bring it to me. [77]

Q. In other words, he did not take you to the train? A. No, he didn't.

Q. He had someone else take you to the train?

A. Yes, he did.

Q. He also told you that your relationship and his relationship hadn't worked out, that as far as he was concerned it was all over, didn't he?

A. No.

Q. Pardon?

A. He didn't explain a thing. We didn't even discuss the whole situation.

Q. Did you just leave in a huff because you were mad?

A. No. I told him I was going to leave, on a Sunday, I believe it was, and we both agreed on a period of two or three days before I would actually leave, and on the third or fourth day he told me that my bags would be ready, that my transportation would be ready.

Q. Isn't it a fact, Mrs. Elliott, that your quarreling continued to such an extent that you just—that Tom told you that the thing for you to do was just to go back to Chicago?

(Testimony of Elaine Elliott.)

A. No. I told him on Sunday that because of the type of friends that he had and the type of associations that he was bringing me into, that I had no further wish to stay in Yakima. [78]

Q. Well, then, when you went back to Yakima—or back to Chicago, as I understand it, you called Mr. Chamales the very next day after you returned?

A. Yes.

Q. And told him that you missed him, is that right? A. Yes.

Q. Told him that you loved him?

A. I believe I said so. I don't remember.

Q. Pardon?

A. I believe I did. I don't remember if I said I loved him.

Q. Well, do you remember anything else about that conversation?

A. I said that I missed him; he told me that he missed me, and did I want to come back, and I said yes.

Q. You had just no more than gotten home?

A. That's right.

Q. Then you called him on the telephone and among other things said you wanted to come back?

A. That's right.

Q. And you called him at the Commercial Hotel?

A. I believe so.

Q. And called him collect, did you, or did you pay for the call?

A. I believe I phoned collect.

(Testimony of Elaine Elliott.)

Q. Well, then, when did you call him next, or he you? [79]

A. I don't remember the next time that I called. I called him quite a few times in the interval that I was in Chicago.

Q. Would you say you called him as many as twenty times?

A. I may have tried twenty times. I didn't speak to him twenty times.

Q. Why didn't you—I don't follow you; you say you tried twenty times, but you didn't talk to him twenty times. What do you mean?

A. He wasn't always in.

Q. You were calling collect, were you not?

A. Yes.

Q. And is it a fact that he refused to accept your calls?

A. They never said he refused to accept a call. They always said he was either out of town or he wasn't where they could reach him.

Q. In other words, when you'd put in your call, why, you were told that he was out of town or was unavailable or something of that nature, is that right? A. Yes.

Q. And how many times would that occur on those calls?

A. Well, I really couldn't say how many times. I tried often when he wasn't there. I didn't think it was at all unusual that he wasn't there every minute.

(Testimony of Elaine Elliott.)

Q. Of course, you don't know whether he was there or not, [80] being in Chicago, do you?

A. No, I don't.

Q. So the information as far as you know is that you did call many, many times, and you were advised that he was not there?

A. Well, many times, perhaps twenty times in three months.

Q. Approximately twenty times in the three months that you called and were advised that he was not in?

A. Some of the times I got to speak to him, some of the times I didn't.

Q. How many times did he accept your calls?

A. I really couldn't say; about four or five times, I imagine.

Q. So that out of this number of calls there was four or five of them that were accepted?

A. Yes.

Q. Isn't it a fact that each one of those times, Mrs. Elliott, he told you to quit calling him?

A. He did not; he never said to stop calling him.

Q. Never did? A. Never.

Q. Told you to forget about him?

A. Never.

Q. And to stay in Chicago and run your own business? A. Never. [81]

Q. Never said that? A. Never.

Q. Well, after you went back, outside of this first call, there was quite some time that there

(Testimony of Elaine Elliott.)

was no phone conversation between you and Mr. Chamales at all, was there?

A. Between when?

Q. Between you and Mr. Chamales. In other words, you went home, I take it, sometime the first part of April? A. Yes.

Q. And right after you got home you called him and had the conversation about missing him?

A. Yes.

Q. Then wasn't there quite some time there wasn't any phone call at all?

A. Yes, until he called me in July.

Q. So then during May and June there was no phone conversation between you?

A. I believe I wrote a few letters and sent a couple of rather nasty telegrams.

Q. If the records of the Commercial Hotel showed that you called Mr. Chamales on the 14th of May would you say that that was correct?

A. If they say so it must be.

Q. And if they showed also that you called him again—speaking now of completed phone [82] calls—— A. Yes.

Q. ——not calls that you made, but calls that were completed—on June 15, 1949, would you say that that would be correct?

A. That could be.

Q. And that you called him again on June 20, 1949, if that could be correct?

A. One of those times I returned a call after he had called me.

Mr. Freeman: Are you going to offer that in

(Testimony of Elaine Elliott.)

evidence, Mr. Olson, the record of calls from the telephone company?

Mr. Olson: Not now, no.

Mr. Freeman: May I see it, then?

Mr. Olson: You mean you want to see what I've got in my hand?

Mr. Freeman: Yes, I'd like to see the record of calls from the telephone company.

Mr. Olson: Well, this is for my information.

Mr. Freeman: You do not have the record of calls from the telephone company?

Mr. Olson: I didn't say I didn't have the record of calls.

Mr. Freeman: You have been leading her to believe that you have. [83]

The Court: Proceed with the examination.

Q. (By Mr. Olson): Mrs. Elliott, on June 23, another call from you to Mr. Chamales, a completed call, would you say that that was correct?

A. Offhand I wouldn't say I talked to him that many times. I don't know. If the records show it, perhaps it's so, but I don't believe I talked to him that many times.

The Court: You're not to assume that the record shows anything. Mr. Olson is just asking you the questions. He holds the record there. You're not to assume the record shows anything. Just answer as best you remember.

A. As best I can remember I'm rather skeptical as to whether I did talk to him that often. It doesn't seem to me I have.

Q. (By Mr. Olson): Would you say that on

(Testimony of Elaine Elliott.)

August 2, 1949, that you called ten to twelve times to get hold of Mr. Chamales and finally did consummate a phone call with him on that date?

A. August 2?

Q. Do you remember that at all, August 2, or if you don't remember the date August 2, right around there?

A. Around that time, yes; he was supposed to send me money, and I called many, many times, to find out what had happened, the reason he hadn't sent me money for the fare [84] back.

Q. Well, then, prior to that you had had a phone call through which it had been arranged that he would send you some money to come out here?

A. Prior to that?

Q. Yes.

A. I believe so, or else during one of those times that I talked to him.

Q. Well, Mrs. Elliott, if I understood you correctly I understood you to say that you remembered calling many, many times on this one day.

A. I didn't say August 2, though.

Q. No, I appreciate you couldn't put your finger right on August 2, but on or about that time you remember calling many, many times to reach him, and finally did, because he was supposed to send you money and hadn't sent it?

A. On or about that date, yes.

Q. And I take it just before that time you had had some conversation with him in which he had said he would send you the money to come out?

A. Yes.

(Testimony of Elaine Elliott.)

Q. And the money hadn't come out?

A. That's right.

Q. And you wanted to come?

A. I definitely wanted to come. [85]

Q. So you called him to see what was holding this money up or why it didn't come, is that right?

A. Yes.

Q. Do you remember the phone call you had with him when he did agree that he would send you the money to come? A. Yes.

Q. Can you tell us approximately when that was?

A. It was the first part of August. I don't remember the exact date, but I do know when we were speaking about it I thought it would be possible for me to get to Yakima by his birthday, which was the 8th of August.

Q. Will you tell me just as nearly as you can what was the conversation that took place, what you said and what he said, on that phone call?

A. I believe he asked me if I had cooled down yet, because I was quite angry at the fact that he would make a promise and then not keep it, about writing or letting me know what was transpiring, and I said well, I thought I had, and he wanted to know if I was ready to come out, and I said yes, I was, and he said "How long are you going to be out for this time?" and I said "This time is for good," and he says "Are you sure, now, that this time you mean to stay?" and I said yes, and then he also asked me if I was willing to work, and I said yes.

(Testimony of Elaine Elliott.)

I was perfectly willing to work, I didn't intend to be a drudge on him. [86]

Q. Then I take it from that that Mr. Chamales was insisting that, or was interrogating you as to whether you were going to be willing to work?

A. Yes.

Q. Before he would send you the money to come out?

A. Well, it was all in the conversation. I don't know if it had any bearing on whether he was going to send me the money or not.

Q. You were then discussing the proposition as to whether or not he would send you the money to come out?

A. Not exactly; we were just discussing the whole thing in general, as to the advisability of him sending me the money to come out, whether or not I would be happy and he would be happy about it.

Q. You wanted to come, and you told him that?

A. I very definitely wanted to come.

Q. And he said "how long would you stay this time"? A. Yes.

Q. And you said "This time I'll stay for good"?

A. Yes.

Q. And also he asked whether you would be willing to work in the hotel?

A. He didn't say in the hotel; he said "Would you be willing to work?"

Q. What kind of work? [87]

A. He didn't say in the hotel. He always made derogatory remarks about working, my not working,

(Testimony of Elaine Elliott.)

and I have been perfectly willing to work all my life, and have since I was thirteen.

Q. When you discussed working in the hotel, prior to the first trip, you told him you had had considerable experience with handling employees?

A. Handling employees?

Q. Yes, or handling people?

A. I don't know what you're speaking about.

Q. Isn't that Patricia Stevens school kind of a charm school?

A. It's a school and an agency combined.

Q. It's a charm school, isn't it, where girls come in and for a consideration are trained in how to apply lipstick and rouge and how to get poise and whatnot?

A. That's right, yes.

Q. And you explained to Mr. Chamales that you had worked in that school as an instructor?

A. Yes, I have.

Q. And that you had considerable training in handling people?

A. Handling people?

Q. Handling people, yes, being an instructor, being over them and training them.

A. I don't believe I ever said I had considerable experience.

Q. Did you say anything about it? [88]

A. I said that I had been an instructor in classes, not a regular instructor, but taking the place of instructors who couldn't be there, and I said that I was not especially adept at handling people.

Q. Didn't you tell him that you could go into

(Testimony of Elaine Elliott.)

this dining room of the Commercial Hotel and handle all the waitresses because of the experience you had had at this charm school?

A. Not that I remember, no. I don't believe I ever said any such thing.

Q. Well, now, anyhow it was arranged that Tom would send the money to let you come out?

A. Yes.

Q. And did he tell you that his mother and father were now out at the hotel?

A. I don't remember if he did or not.

Q. And isn't that why he told you he was going to have to send this money to Marge Maloney or Mahoney, what is it——

A. Mahoney.

Q. ——and that he would sign another name, because his mother had found out about you? Isn't that what he told you on the phone?

A. No, he never said anything like that at all.

Q. You don't remember anything about that?

A. Never. I would remember definitely if he had that [89] particular point.

(Whereupon, a letter was marked Defendant's Exhibit No. 4 for identification.)

Q. Showing you, Mrs. Elliott, defendant's identification number 4, I'll ask you to examine that and tell me if you recognize it?

A. What is it you would like to know?

Q. I asked you if you recognized that?

A. I definitely do.

Q. Is that a letter which you wrote?

(Testimony of Elaine Elliott.)

A. Yes.

Q. That from beginning to end is in your handwriting? A. Yes.

Q. And written by you? A. Yes.

Q. To Tom? A. Yes.

Q. Now, can you say when you wrote it?

A. No, I can't.

Q. Is it not a fact it was written shortly after your return from the first trip out here?

A. I don't think it could have been too shortly afterwards, no.

Q. It was in between there sometime, was it not?

A. Sometime, yes. [90]

Q. Between the first trip and the second trip?

A. Yes.

Q. But just how soon after the first trip you don't know? A. No, I don't.

Mr. Olson: We offer in evidence defendant's identification 4.

The Court: Let counsel see it.

Voir Dire Examination

By Mr. Freeman:

Q. Miss Elliott, did you say you could or could not remember the date this letter was written?

A. I can't remember the date.

Q. Did you say it was written between the first and second trip out, or did you not?

A. Yes, I believe so.

Q. It was written between the first and second trip? A. Yes.

(Testimony of Elaine Elliott.)

Mr. Freeman: I have no objection.

The Court: It will be admitted.

(Whereupon, Defendant's Exhibit No. 4 for identification was admitted in evidence.)

Mr. Olson: May I have the Court's permission to read this to the jury?

The Court: Yes, all right.

(Whereupon, Mr. Olson read Defendant's Exhibit No. 4 to the jury.) [91]

Q. (By Mr. Olson): Mrs. Elliott, I take it this statement that you made in here, "I have pursued you shamefully," is a correct statement?

A. When I wrote the letter I was very upset. I don't see how that can be used as any sort of evidence.

Q. Well, now, my question is when you wrote that——

A. When I wrote that I didn't know what I was saying or what I was doing. I was in very bad shape.

Q. Very bad shape?

A. Mentally in very bad shape.

Q. You weren't intoxicated, as you referred to in one paragraph in your letter?

A. I don't know; I could have been.

Q. Do you think you were?

A. I don't know.

Q. Do you remember writing this letter?

A. Vaguely, yes.

Q. You said, I believe, you wrote a number of letters? A. Yes.

(Testimony of Elaine Elliott.)

Q. Do you know whether or not this particular letter came into the possession of Tom's mother?

A. I have no idea.

Q. Were you ever advised that it had?

A. Not that I know of, no.

Q. You did write a number of letters, as I understand you? [92]

A. Yes, quite a few.

Q. Were they of similar import to this one?

A. I don't remember what the other letters said, to tell you the truth. I always wrote them when I was terribly upset, and wrote whatever came into my head.

Q. When you said you came back to Chicago very much in need of blue ointment, what do you mean by that?

A. Do I have to explain?

Q. I would like you to.

A. Well, blue ointment is used for the—I don't know how to put it, myself. It's used for—for the killing of a rather microscopic bug.

Q. Did you use blue ointment when you got home?

A. No.

Q. But you needed it?

A. Yes.

Q. Does this microscopic bug that you use the blue ointment for have anything to do with sexual relations?

A. Very definitely. It's usually associated with people who are not clean, people who associate with prostitutes or loose women.

Q. And you returned to Yakima in need of that—I mean to Chicago in need of that; that's a true statement, is it?

(Testimony of Elaine Elliott.)

A. That is true, yes. I didn't even know what it was.

Q. I gather that you had heard—well, who is this Marty [93] that you referred to three or four times?

A. Marty is the nickname of Martin McDonald.

Q. This Marty referred to in the letter is the same individual that you referred to, Martin McDonald? A. Yes.

Q. Who had introduced or arranged an introduction between you and Mr. Chamales?

A. Yes.

Q. And the Marge that's referred to in here is your roommate? A. Yes.

Q. Mr. McDonald lives where?

A. As far as I know he lives at the Arrington in Evanston, but I'm not sure.

Q. Does he have a home in Yakima?

A. I was led to believe that he had a suite that was kept for him at the Commercial Hotel.

Q. Do you know where his wife and family is?

A. I didn't know he had a wife and family.

Q. Well, if he has you don't know where they are, is that right?

A. I had never even heard of them until this moment.

Q. Well, now, then when you made this second trip there wasn't anybody at the station or at the airport to meet you?

A. When I arrived in Seattle? [94]

(Testimony of Elaine Elliott.)

Q. Yes, when you arrived in Seattle there was no one there to meet you? A. No.

Q. So then you went to the Olympic Hotel?

A. Yes.

Q. And that's where you understood that you were going to stay?

A. That's where I was under the impression that he had registered me or gotten a reservation for me there.

Q. Under a false name?

A. Yes, he suggested Elaine Palmer.

Q. That name interests me. Do you know anything about where he got that name?

A. I have no idea where he got that name.

Q. Then you stayed at the Olympic Hotel about how long? Several hours, waiting for Mr. Chamales?

A. I didn't stay at the Olympic Hotel. When I found out there was no reservation for me I went back out to the airport to see if perchance he could be meeting the plane that I should have been on.

Q. Then you were at this time still very much in love with Mr. Chamales? A. Yes.

Q. Very much so, and you then went back to the Olympic, did you, from the airport? [95]

A. From the airport I believe I went back to the Olympic, where I'd left my bags, and I took them and checked into the Earl Hotel.

Q. E-a-r-l, is that right?

A. I don't know, it might have an "e" on the end. I don't know.

(Testimony of Elaine Elliott.)

Q. And you registered there in your own name?

A. Yes.

Q. Had you stayed there before?

A. Never.

Q. And then Mr. Chamales did subsequently contact you there? A. Yes.

Q. Well, then, how long were you in Seattle before you returned to Yakima?

A. That evening; the next day we returned to Yakima.

Q. So you stayed in Seattle then just one night upon your arrival—— A. Yes.

Q. ——on the second trip; and on that trip Tom said in substance, I mean on your arrival, that he had a lot of plans for you, and you said what are they, and he said “Well, I’m going to put you in a joint.” You kind of wondered about that, but went to bed with him and slept with him that night?

Q. Well, he had told me on my first trip that he thought he [96] could get me into a night club in Seattle singing; singing is a hobby of mine; when he said he was going to put me in a joint, never having known what his expression of the word was, I thought maybe he meant a night club as a joint, maybe not the most elite place in the world, as a start to get me singing.

Q. Did you ask him what he referred to, “Where am I going to sing or dance?”

A. No, I didn’t pursue the subject at all when he said it.

(Testimony of Elaine Elliott.)

Q. Then the word that night meant nothing to you? A. That's right.

Q. Nothing out of the way at all? A. No.

Q. First, Mrs. Elliott, you've told us all you can remember about the conversation that you had with Mr. Chamales that led up to your coming out here?

A. Well, I wouldn't say I'd told you everything. There's probably a great deal I haven't.

Q. I said everything you can remember?

A. At this time, yes. I could probably remember more later.

Q. You mean you might know something else tomorrow that you don't know today, is that what you mean? A. It's possible.

Q. What will bring it back to your mind tomorrow if you don't know about it today? [97]

A. Well, further questioning, I believe.

Q. How many times have you been interviewed by the F.B.I. agents about this matter?

Mr. Freeman: Your Honor, I think that's——

The Court: Sustain the objection. That's immaterial. Let's get on with this cross-examination; we want to get this trial over with in less than a week if possible. I think you're taking too much time, Mr. Olson.

Mr. Olson: Pardon?

The Court: I think you're taking too much time.

Q. (By Mr. Olson): Well, Mrs. Elliott, the next day, then, you went to Yakima, is that right?

A. Yes.

Q. And you and Tex Reed and Tom picked up

(Testimony of Elaine Elliott.)

Mrs. Vicky Reed on the way and came on into town, to Yakima?

A. Yes, after stopping in a little town called Ellensburg.

Q. Pardon?

A. The four of us stopped in a town called Ellensburg.

Q. That's about thirty-five miles out of Yakima?

A. Yes.

Q. And then you went to the hotel?

A. Yes.

Q. Now, Mr. and Mrs. Chamales, Sr., were there at the hotel and in active charge of the hotel at that time, were they not? [98]

A. I don't know. He snuck me in. I got the impression that they were.

Q. And you went out the next day?

A. Yes.

Q. And then stayed at the Rest Haven Hotel?

A. Motel.

Q. Motel? A. Yes.

Q. And that's out where a good many motels are, in the motel area of Yakima, is it not, and it's a nice place? A. Well—

Q. Pardon? A. As nice places go.

Q. And then you were there for how long?

A. Just one evening, one night.

Q. Now, did you say that Tom—did I understand you to say that Tom hit you, or something, there? A. Yes.

Q. Whereabouts did he hit you?

(Testimony of Elaine Elliott.)

A. Hit me across the mouth.

Q. Hurt you any?

A. And once or twice on the body.

Q. Pardon? A. Of course he hurt.

Q. Well, did it cause you any injury? [99]

A. I had a dislocated jaw as the result of some of his treatment. It pops in and out on occasion.

Q. Well, did his striking you on this occasion cause you a dislocated jaw?

A. I don't know if it was on this occasion or one of the other occasions on which he struck me.

Q. Well, did you have to secure any medical attention because of it?

A. I was treated in Chicago for it.

Q. Who by? A. Dr. Belkey.

Q. When was that?

A. I believe the last part of July, just before I went out the second time.

Q. And that was because of Tom's having struck you?

A. Yes. He struck me quite frequently the first time I was out there, and the second.

Q. Well, now, do you recall of testifying in your divorce action by your husband that——

A. I didn't testify.

Q. Pardon? A. I didn't testify.

Q. Well, before what they call a master——

A. I didn't testify in my divorce action, in the completed bill. [100]

Q. Do you remember giving testimony under

(Testimony of Elaine Elliott.)

oath in some kind of a hearing in connection with your divorce proceeding?

A. Yes. That has been stricken, as far as I know.

Q. Well, my question is, do you remember giving testimony in that proceeding? A. Yes.

Q. You were represented by an attorney by the name of Mr. Davidson? A. Yes.

Q. And your husband was represented by Mr. Joseph Baer; do you remember that? A. Yes.

Q. And do you remember at that hearing, Mrs. Elliott, where you were interrogated with reference to his cruel treatment of you? Do you remember that? A. Yes.

The Court: That question isn't clear to me. I don't know whether it is to the witness or not. "His cruel treatment of her."

Mr. Olson: Mr. Wright Elliott's cruel treatment. You claimed in your divorce action that Mr. Wright Elliott had mistreated you?

Mr. Freeman: Your Honor,—

The Court: I'll excuse the jury; I'm going to take a five-minute recess. The jury can step out first. [101]

(Whereupon, the following proceedings were had without the presence of the jury:)

Mr. Freeman: Your Honor, I make the objection that Mr. Olson's present examination is most improper. What may have been the grounds of divorce, and I presume that's the purpose of his questioning, is absolutely immaterial in the case. What previous difficulties, divorce or otherwise, this

(Testimony of Elaine Elliott.)

woman may have had with her husband has not materiality in the case. Her chastity or lack of chastity has no materiality.

The Court: I quite agree with you on that. What is the purpose?

Mr. Olson: If your Honor please, the witness testified under direct examination and has also testified again that Mr. Chamales struck her on the face; as a result of that she received a dislocated jaw and was treated by Dr. Belkey in Chicago. I offer to prove that in her divorce proceedings she claimed that she received a dislocated jaw by virtue of a blow from her husband; that she got a treatment from this same doctor and at the same time. If she goes to Dr. Belkey to get this dislocated jaw treated—of course, I'll admit that the witness is now being advised all about it, but she testifies under oath; in other words, I'm offering to show previous inconsistent statements under oath to a matter which she has testified [102] to here directly, namely, that she received a dislocated jaw from being struck in the face by Tom Chamales, and it's a vital point in the case, your Honor, because she's claiming, apparently, that it has something to do with some treatment of Tom in trying to get her to go into a house of prostitution.

(Argument of counsel.)

The Court: I think it's collateral; I don't believe it's direct enough so that you should be permitted to go into documentary evidence to disprove some-

(Testimony of Elaine Elliott.)

thing you brought out. I'll sustain the objection, exception, and recess for five minutes.

(Short recess.)

(Whereupon, the following proceedings were had within the presence of the jury:)

Cross-Examination

(Continued)

By Mr. Olson:

(Whereupon, three letters with envelopes were marked Defendant's Exhibits Nos. 5, 6 and 7 for identification.)

Q. Mrs. Elliott, showing you defendant's identification 5, I'll ask you if you recognize that letter and envelope? A. Yes, I do.

Q. Is that written by you? A. It is.

Q. Pardon? [103] A. Yes.

Q. Under what date? A. It has no date.

Q. What's the date of the envelope?

A. The date of the envelope is September 5, 1948.

Q. And that is addressed to Mr. and Mrs. A. J. Ollendorf? A. That's right.

Q. Who are they? A. My grandparents.

Q. You wrote that letter? A. Yes.

Q. And mailed it? A. Yes.

Mr. Freeman: What was the date again, Mr. Olson?

The Witness: On the envelope it's September 5, 1948. No date on the letter.

(Testimony of Elaine Elliott.)

Q. And showing you defendant's identification——

The Court: 1948, is that?

Q. Yes, your Honor; showing you defendant's identification 6, I'll ask you if you recognize that?

A. Yes, I recognize it.

Q. Is that a letter which you wrote?

A. Yes.

Q. And who is it addressed to?

A. Well—— [104]

Q. Who is the envelope addressed to?

A. Mrs. J. W. Eskridge.

Q. And who is she?

A. She's my ex-mother-in-law.

Mr. Freeman: What is the date of that letter?

A. September 17, 1948.

Q. And showing you defendant's identification number 7 I'll ask you if you recognize that?

A. Yes.

Q. Is that a letter written by you?

A. Yes.

Q. And who is it written to?

A. Mrs. A. M. Kimbrough.

Q. And who is Mrs. A. M. Kimbrough?

A. She is my ex-husband's aunt.

Q. And what is the date?

A. The date on the letter is October 7, 1948, and the date on the envelope is October 11, 1948.

Mr. Freeman: Your Honor, it will take a few moments to examine these.

The Court: Well, I'll ask the jury to step out

(Testimony of Elaine Elliott.)

again. You may as well be relaxing while we're going through these matters.

(Whereupon, the following proceedings were had without the presence of the jury:) [105]

The Court: You propose to offer these letters in evidence, I presume?

Mr. Olson: Yes, I do.

The Court: What was the purpose of the offer?

Mr. Olson: What I'm interested in, your Honor, and what I propose to enter these letters for and to follow with other testimony, is for affecting the credibility of this witness. These letters in substance refer to a—well, first bear in mind, your Honor, that this lady has testified that in the latter part of February, 1949, or in the beginning of March, 1949, that she met and immediately fell in love with Tom Chamales, and has professed this great love for him ever since, or I shouldn't say ever since, but up to the second trip. Now, in the first place, these letters are letters in which she—and they're written within six months prior to this meeting with Tom Chamales, in which she professes a love at least equal to if not greater than the love, for one Bobbie Elliott, which was her then brother-in-law, as she now claims she has for Mr. Chamales, and it seems to me, your Honor—

The Court: You don't mean to infer that a lady can't fall in love twice within six months, do you?

Mr. Olson: Your Honor, she had to do more than that, though, within six months. At the time [106]

(Testimony of Elaine Elliott.)

these letters were written she was then, according to these letters, on a trip with her brother-in-law, and the love that she expressed for him in those letters, as I say, is at least of equal intensity with the love that she professes for Mr. Chamales. Now, she had to fall out of love with him, and into love—there had to be two transactions; she had to get out of love with Bobbie in order to get into love with Tom in that six months. After all, Mr. Chamales——

The Court: The whole matter of whether she was in love with Mr. Chamales or whether she wasn't or whether it was good, deep, clean love or very shallow, superficial love, or sexual attraction, I think is only remotely connected with this case. The question is whether he transported her for immoral purposes; that's the whole gist of this lawsuit. It doesn't matter whether she was a clean young virgin or a prostitute; in either case he would be guilty if he transported her for immoral purposes.

(Argument of counsel.)

The Court: Bring in the jury and we'll adjourn overnight.

(Whereupon, the following proceedings were had within the presence of the jury:)

The Court: We're going to take an adjournment until tomorrow morning, ladies and gentlemen, tomorrow morning [107] at 10 o'clock, and I wish you to bear in mind what I've heretofore said about not

(Testimony of Elaine Elliott.)

discussing the case with anyone, and you should refrain also from reading any newspaper accounts or listening to radio broadcasts about this trial. I also believe I should say, too, that you should refrain from talking to any of the witnesses in this case on any subject whatsoever; don't even talk to them about the weather, because if someone sees you talking to a witness then it arouses suspicion and questions whether the trial is going as it should, and you should not talk to any witness at all on any subject, or to any of the attorneys, until the trial is over. The Court will adjourn now until tomorrow morning at 10 o'clock.

(Whereupon, at 4:30 o'clock, the Court took a recess in this cause until Wednesday, January 10, 1951, at 10 o'clock a.m.) [108]

January 10, 1951, 10 A.M.

(All parties present as before, and the trial was resumed, without the presence of the jury.)

The Court: Will counsel step up to the bench?

(Whereupon, the following proceedings were had at the bar:)

The Court: Mrs. Stanke, the number 1 juror, called me this morning and said that after she got home last night that her husband called to her attention the fact that he had at one time been employed as an airplane mechanic at Geiger Field, that was during the last war, and she said she hadn't thought of it

(Testimony of Elaine Elliott.)

as being a federal employee, and this morning I had Mr. Taylor come into my chambers and go over the interrogation of Mrs. Stanke, and we find that she was not asked if she had a relative who had ever been employed; she was asked if she had a relative on either side who was presently employed, so her answers to the questions were correct and obviously there wasn't any attempt at concealment because she was frank enough to call up, and I told her it would be all right to sit on the jury. I didn't want to give the matter any publicity.

Mr. Freeman: That's all right.

Mr. Crowley: Fine, your Honor. [109]

(Whereupon, the following proceedings were had in open court, still without the presence of the jury:)

The Court: All right, Mr. Olson.

Mr. Olson: Your Honor, I think to have the matter squarely before the Court I might first state what we offer to show.

The Court: Yes. Also I don't think there has ever been any formal offer of the documents that are the main subject of discussion here.

Mr. Olson: Then I do, your Honor, offer in evidence defendant's identifications 5, 6 and 7, and the defendant offers to prove by the cross-examination of Elaine Elliott that shortly prior to meeting Mr. Chamales that she took a trip, while she was married to Wright Elliott, that she took a trip with her brother-in-law, Bobbie Elliott, from Chicago to

(Testimony of Elaine Elliott.)

Tulsa and return through Pine Bluffs, Arkansas, back to Little Rock. We offer to show that in her divorce proceeding——

The Court: Pardon me; before you leave that subject I wonder if you couldn't make the time element a little more specific? You say shortly before; that might vary over a period of weeks or months, depending on your idea of shortly.

Mr. Olson: That the trip was taken during September and October of 1948. [110]

The Court: All right.

Mr. Olson: That the witness Elaine Elliott in her divorce proceedings, by way of a verified complaint, swore under oath, the custody of her child in the divorce proceedings being at stake, that she swore under oath in her pleadings that that trip was instigated at the suggestion of her husband Wright Elliott for the purpose of indicating adultery with his brother Bobbie Elliott, and that the entire matter was a conspiracy between her then husband Wright Elliott and her brother against her; that throughout the entire trip she had not stayed or slept with Bobbie Elliott in the same bed or cabin, and that the entire relationship was entirely proper between them. I further offer to show that in her divorce proceedings she was interrogated under oath and testified substantially to those facts, that while the trip was taken it was not at her instigation or her request, but solely because her husband and brother-in-law had had a conspiracy against her. We then offer to show by the defendant's identifica-

(Testimony of Elaine Elliott.)

tions 5, 6 and 7, and by the witness' testimony on cross-examination, which we believe she will be forced to admit, that those sworn statements in her complaint, her counter-complaint, as well as the sworn statements made in the divorce proceedings, were false, and that she knew them to be false at the time that [111] she made the statements. We submit that the records which we have referred to, the divorce complaint, or her counter-complaint, which I have not yet, your Honor, had identified or offered in evidence but which I now offer or I have here and I'm willing to offer, a photostatic copy of her countersuit, in which she made the allegations that I've referred to, we submit that that, together with the record of the testimony, together with these letters, are admissible for the following purposes:—

The Court: Pardon me; before you go into that I wonder if it wouldn't make a better record if we have any documents you refer to identified so that they will be available as a part of the record.

(Whereupon, photostatic copy of answer and counter-complaint were marked defendant's Exhibit No. 8 for identification.)

The Court: Now just state briefly what that is.

Mr. Olson: Your Honor, in the Chicago practice, I'm not entirely familiar with it, but what it is, the one document is labeled an answer to the complaint, and then apparently companion to it is what is labeled a counter-complaint for divorce. We would

(Testimony of Elaine Elliott.)

file an answer and cross-complaint, but one is not complete without the other.

The Court: It's understood that you've offered or [112] are offering identification 8 also.

Mr. Olson: Yes, we offer it.

(Argument of counsel.)

(Whereupon, two auto court registration cards were marked Defendant's Exhibits No. 9 and 10 for identification.)

Mr. Olson: We also offer in evidence defendant's identification 9, which is a registration at the Sycamore Court at Little Rock, Arkansas, under date of October 19, 1948, during this trip, the registration "Mr. and Mrs. B. Elliott" and defendant's identification 10, being a guest registration dated September 15, 1948, also during this trip, a registration at the Anchor Court in Laurel, Mississippi, and her record will show that this looks like Bobbie Elliott's, that's the brother-in-law, signature.

(Argument of counsel.)

The Court: For the present, at any rate, I'll deny the offer of defendant's identifications 5 to 10, and the record may show an exception for the defendant. Mr. Freeman, Mrs. Elliott will be available here throughout the trial, I presume?

Mr. Freeman: If it's so ordered, yes, your Honor.

The Court: Well, I think she should be kept until the conclusion of the government's case. What I have in [113] mind, I have my law clerk checking

(Testimony of Elaine Elliott.)

up for me on this question of the admissibility of the proffered evidence, and if I should conclude that my ruling hasn't been correct I would like to be in a position to have Mrs. Elliott recalled and the defense given an opportunity to cross-examine her further. At the present time, however, the ruling will be that the offers are rejected. I think, Mr. Olson, that you should be permitted to cross-examine her with reference to any inconsistent statements, or statements inconsistent with her present testimony, or past conduct inconsistent with her present testimony, and specifically I think you may be permitted to ask her if she didn't testify that the injury she received, or I mean testify in a prior case, in her divorce action, that the injury she received was received from her former husband rather than from this defendant, and also I think you should be permitted to ask her if she weren't at some time only a short time or two or three months prior to meeting the defendant in love with some other man, and inquire on that line, although I think you'd be bound by her answers, and at the present time at any rate I'm not going to permit you to then attempt to contradict whatever she may say by putting in these documents. Do you get what I have in mind?

Mr. Olson: Yes, I do, your Honor. [114]

The Court: All right, you may call in the jury, then.

(Testimony of Elaine Elliott.)

(Whereupon, the following proceedings were had within the presence of the jury:)

The Court: I'd like the record to show that all of the jurors and the alternate are present. All right, Mrs. Elliott, if you'll take the stand, you may proceed with the cross-examination.

Cross-Examination

(Continued)

By Mr. Olson:

Q. Mrs. Elliott, you testified yesterday that when you met Mr. Chamales that was the latter part of February or the first part of March of 1949?

A. Yes.

Q. And that you immediately fell in love with him at first sight?

A. Yes.

Q. Now, is it not a fact, Mrs. Elliott, that a matter of two or three months prior to that time you were then madly in love with your husband's brother-in-law, or your husband's brother, excuse me?

A. Not madly in love, no.

Q. Pardon?

A. Not madly in love, no.

Q. Well, is it not a fact that you were in love with your husband's brother?

A. I loved him as a companion and friend. [115]

Q. Now, you testified yesterday, Mrs. Elliott, that at an occasion in Yakima you were slapped, I think, by Mr. Chamales as a result of which your jaw was dislocated, and you consulted with a Dr. Belkey, or what was the name of the doctor?

A. Dr. Belkey, yes.

(Testimony of Elaine Elliott.)

Q. Dr. Belkey in Chicago; that's correct, is it not?

A. I didn't say at the moment we spoke of the slapping, which of course was the second trip I made out here, I said it wasn't at that time; however, I believe now it was from one of the former times that he had struck me on the first trip that I made out.

Q. When did you go to see Dr. Belkey?

A. I don't remember, now.

Q. Did you not testify, Mrs. Elliott, in your divorce proceedings or in some proceeding connected in the divorce action brought by your husband against you in Chicago, that you consulted this Dr. Belkey in Chicago in the latter part of August of 1949, this was following your trip out here, by reason of a dislocated jaw which you received from a blow by your husband Wright Elliott?

A. It was my belief at that time that that was so.

Q. And you did so testify in your divorce proceedings?

A. Yes, that was my belief.

Q. That your dislocated jaw had been caused by a blow from [116] your husband Wright Elliott?

A. Yes; I did testify to that, yes.

Q. Now then, you testified yesterday with reference to what occurred prior to the second trip out, the phone calls and the letters, and I'll not go back into that. Is it not also true, Mrs. Elliott, that you requested transportation out to Yakima through the Northwest Airlines? What I'm getting at, didn't you go to the Northwest Airlines in Chicago and ask

(Testimony of Elaine Elliott.)

them to have their Yakima office contact Mr. Chamales to send you, to provide you with transportation to Yakima by Northwest Airlines, and he refused to do so?

A. No, that's not so. I thought that maybe something had happened to the money order that he said he was going to send me, and I was trying to check up and see whether it was just the fact he hadn't sent it, or it had been lost. I contacted the Western Union in Yakima to see if it had been sent, and before that I contacted the Northwest Airlines to see whether they could find it themselves before I had to pay for the call to Yakima to the Western Union. My name was on the mailbox in very small print, and it was very difficult to see, and I thought perchance the telegram could not be delivered because they didn't realize which apartment I was in.

Q. Didn't you go to the Northwest Airlines, not for the [117] purpose of inquiring whether they had reservations, but didn't you go to the Northwest Airlines and request that they have their Yakima office contact Mr. Chamales in Yakima to okay your passage to Yakima by Northwest Airlines?

A. Not that I remember, at any time, did I do that.

Q. You do not remember that? A. No.

Q. Is it possible that you did that?

A. Well, there's many things are possible, but as far as I can remember nothing ever happened in that manner.

Q. Do you deny that you did that?

(Testimony of Elaine Elliott.)

A. I don't deny or affirm it. It could be possible, but I don't remember it.

Q. Well, is it just as likely to be true as it is to be untrue?

Mr. Freeman: Your Honor, I object to that. He's asked whether she remembers it, and she says she does not.

The Court: I'll overrule the objection.

A. What is it?

Q. I say, is it just as likely that you did make that request as it is that you did not make that request?

A. I'm sorry, but as far as the question you've given me, I don't think I understand it completely.

Q. I see. Well, you're unable to state, as I understand it, [118] whether or not you went to the Northwest Airlines and asked that they contact Mr. Chamales in Yakima to okay passage for you. You just don't recall whether you did that or whether you didn't? A. I recall, as I said before——

Q. No, I'm not asking you what you recall about that.

A. The way you state it, no, I don't recall it, if I've understood you.

Q. Now, you know Mrs. George Crowley?

A. I've met her, yes.

Q. That is Tom Chamales' sister? A. Yes.

Q. In New York—or in Chicago, and the wife of George Crowley who is here; you know who she is? A. I believe so.

Q. You've met her. Now, isn't it a fact also,

(Testimony of Elaine Elliott.)

Mrs. Elliott, when you were attempting to get your phone calls to Mr. Chamales answered, that you did on some occasions, I'll ask you first on at least one occasion, state that this was Mrs. George Crowley calling?

A. I don't remember. I could have.

Q. Now, could you have done that more than once? A. Not that I know of.

Q. Pardon? A. Not that I know of. [119]

Q. Do you recall doing that on one occasion and finding yourself in communication with Mr. Senior Chamales? A. Not that I know of.

Q. At which time the conversation terminated immediately? A. I don't remember that, no.

Q. You don't remember it, Mrs. Elliott?

A. I don't remember talking to him, no.

Q. If you don't remember talking to him, do you remember making the call, a collect call, and saying that it was from Mrs. George Crowley in Chicago, and hearing Mr. Senior Chamales answer the phone? Do you remember that?

A. I can't say I do remember it. Oftentimes I made many calls in a rather hysterical state of mind.

Q. Do you mean hysterical, or under the influence of intoxicating liquor?

A. Hysterical or under the influence of intoxicating liquor.

Q. Would you say that frequently when you called you would be under the influence of intoxicating liquor? A. Not frequently. Occasionally.

(Testimony of Elaine Elliott.)

Q. About how many times did you make calls to Yakima when you were under the influence of intoxicating liquor to the extent——

A. I have no idea except that I know I had on several occasions.

Q. Now, Mrs. Elliott, you testified yesterday that when you [120] got on to the train to come out to Yakima with Mr. Chamales that you were surprised to learn that you had a single compartment. I want to ask you if it isn't a fact during your conversations with Mr. Chamales prior to taking the train, and on the dates that you had with him in Chicago, that you in those conversations advised Mr. Chamales that you had made trips with other men, during which you slept and stayed with them?

A. No, it's not true.

Q. Pardon? A. No, it is not true.

Q. You did not make those statements to him?

A. No, I didn't.

Q. Now, when you got to Seattle the second trip, and I went into it yesterday about the Earl Hotel, the next morning at the Earl Hotel Mr. Chamales made a statement to you, as I understood you to testify, that referred to prostitution, and later dismissed the matter as though it had been a joke, is that correct? A. No.

Q. Didn't you say that he dismissed the matter as though it had been a joke?

A. Not all of your statement was correct. I said while we were sitting in the Richeleau Cafe having breakfast, I inquired as to what he meant by a joint

(Testimony of Elaine Elliott.)

when he had told [121] me the previous evening he was going to put me in a joint, and then he said it was a house of prostitution.

Q. Then he passed it off as a joke, is that right?

A. Not exactly as a joke; as if it was just an idea that he had and that I shouldn't take it too seriously.

Q. As though it were a frivolous idea?

A. Not frivolous; just an idea he had that he had thought about for some time but wasn't too certain he intended to do.

Q. You certainly didn't believe that he had?

A. I certainly didn't at that time; I had no idea at all that he had; I had very much confidence in him.

Q. By the way, the Commercial Hotel in Yakima is the number one hotel there, is it not, the leading hotel?

A. I have no idea.

Q. Well, it's located right on Yakima Avenue, is it not?

A. I don't have any idea of the status of the hotel.

Q. Well, it's located right on Yakima Avenue, the main street of Yakima?

A. To tell you the truth I can't remember what street it's on.

The Court: I think it might be stipulated that it's the principal hotel at the present time, at any rate.

Mr. Freeman: Yes.

The Court: All right, go ahead. The court

(Testimony of Elaine Elliott.)

will [122] take judicial notice of it, but I don't think the jurors know it.

Mr. Olson: Well, of course the new hotel, they're working furiously on it now.

Q. (By Mr. Olson): Mrs. Elliott, you knew, did you not, that Mr. Chamales, Tom Chamales, Jr., had no connection with any house of prostitution?

A. I didn't know anything; I only surmised.

Q. Well, you certainly had no surmise that he did, did you?

A. I naturally didn't think that the man I loved could be a pimp, if what you mean is that.

Q. No. Now, the trip out the second time was of rather short duration, that is your stay out here was rather short? A. Yes.

Q. Now, at the time that you were at the motel in Yakima, the Rest Haven Motel, when you said Mr. Chamales struck you, is it not a fact, Mrs. Elliott, that that occurred, if it did occur, when you told him that you complained to him about not staying at the hotel, and being out at the motel, and that you complained about the way he was treating you, and that you told him that you were acquainted with a friend who was married and lived either in Denver or Salt Lake, a wealthy man, and that if Tom didn't treat you better that you were going down and stay [123] with him, that he was perfectly willing to keep you, and that you had been with him before? Did you not make that statement?

A. No, I didn't.

Q. Well, did you make any similar statement?

(Testimony of Elaine Elliott.)

In other words, is there some things I said in there you're objecting to, or is it all wrong?

A. It was such a long sentence it would be hard to agree to the whole thing.

Q. Did you make any statement to him there in the Rest Haven Motel with reference to some man in Denver or Salt Lake that you could go down and stay with, that led up to your being slapped?

A. No. I did tell him at one time, which was when he first told me that he was going to place me in a house of prostitution, I told him that I thought I would go to Denver then, if that were the case, that I didn't particularly care to go back to Chicago to face my friends.

Q. That you would go to Denver A. Yes.

Q. Now, Mrs. Elliott, were you in the Earl Hotel in Seattle at the time that you and Mr. Chamales parted company? A. The Earl Hotel?

Q. Yes, or was it this Wilhard?

A. When we parted company for the last time I was staying at [124] the Wilhard.

Q. Now, isn't it a fact that at the Wilhard Hotel when you parted company that you again told Mr. Chamales that you were going to go to Salt Lake or Denver at the instance of some man who lived there, and that he would take care of you?

A. No, I never said that any man would take care of me. I just didn't care to go back to Chicago.

Q. Mr. Chamales at all times after you came out here offered to provide you with transportation back to Chicago? A. What is it?

(Testimony of Elaine Elliott.)

Q. Mr. Chamales, Tom, at all times offered to provide you with transportation back to Chicago?

A. No, he didn't.

Q. Isn't it a fact that he told you when he left that any time you wanted to go to Chicago that he would provide you with the transportation back; that he was not going to provide you with transportation down to this other man?

A. Of course not; he never even said anything about transportation back to Chicago. He was intent upon me doing what he wanted me to do.

Q. Never mind what his intent was; what did he say?

A. He never said anything to that effect.

Q. And didn't you say, Mrs. Elliott, that if he walked out and left you there at the Wilhard Hotel, that you were [125] going to get him?

A. I never did.

Q. Pardon?

A. I never said a thing like that.

Q. That if you couldn't have him that you were going to see that nobody else ever got him?

A. No, I didn't say that.

Q. You didn't say that?

A. Not in the slightest.

Q. How soon after that termination did you go to the Federal Bureau of Investigation?

A. After the last time I saw him at the Wilhard I went to the Federal Bureau of Investigation about three days later.

Q. About three days afterward you went to the office of the Federal Bureau of Investigation?

(Testimony of Elaine Elliott.)

A. Yes.

Q. That's their Seattle office?

A. I believe so, yes.

Q. Now, who did provide you with your funds to return to Chicago? A. Two friends of mine.

Q. Who were they?

A. Mr. Roy McAndrews of Chicago—well, he was the one that provided my funds.

Q. You said there were two friends, so there must have been [126] somebody else. Who was that?

A. That was the only one that sent me transportation to Chicago.

Q. Who did you refer to yesterday when you said two of your friends did?

A. I didn't say they sent me transportation.

Q. Well, you did refer yesterday and again today to two friends.

A. They asked me how I got back to Chicago.

Q. Without arguing with you as to just the nature of your testimony, who were the two friends that you referred to in your testimony?

A. One friend, as I say, was Mr. Roy McAndrews.

Q. Yes.

A. Another friend was the uncle of a friend of mine in Denver.

Q. Pardon?

A. Was the uncle of a friend of mine in Denver.

Q. What was his name?

A. His first name was Harold. I can't even recall his last name now; it was some time ago.

Q. You say his first name was Harold?

(Testimony of Elaine Elliott.)

A. Yes.

Q. And you can't remember his last name?

A. No. [127]

Q. Did you call him from Seattle?

A. No, I didn't.

Q. How did you get in touch with him?

A. I wrote him a letter, if I remember right.

Q. Did you just write it "Harold" at Denver, or did you have his last name on the letter?

A. I had his last name.

Q. Well, what is it?

A. I don't remember it.

Q. Do you remember the address? A. No.

Mr. Freeman: Your Honor, I'm again going to object to the line of questioning. I can't see the materiality of it.

The Court: Well, I presume this is the last. You don't know it?

A. No, I don't.

The Court: All right, go ahead.

Q. Did you request from Harold funds to go to Denver?

A. Request from Harold funds to go to Denver?

Q. Yes. A. No.

Q. You stated that you did not wish to return to Chicago? A. That's right.

Q. Did you make any attempt to go to Denver? [128]

A. I stopped off in Denver on my way back to Chicago.

(Testimony of Elaine Elliott.)

Q. So your trip back to Chicago then was by way of Denver, Colorado?

A. My trip up and back.

Q. Have you ever been—have you ever worked in a house of prostitution? A. Never.

Q. Or what is known as a “call flat”?

A. Never.

Q. Did you make a statement—is it not a fact that you did make a statement to your aunt that you expected to get out of this trial or the result of this trial a Hollywood contract?

A. Of course not. How could I possibly expect that, it's so scandalous?

Q. I'm not asking you whether you expected it. Did you make that statement?

A. No, I didn't. It's ridiculous.

Q. You did not? A. Never.

Mr. Olson: That's all, your Honor.

The Court: Any redirect examination?

Redirect Examination

By Mr. Freeman:

Q. Mrs. Elliott, what day of the week, as you recall, did you arrive in Seattle on your plane trip from Chicago, on your [129] second trip to Yakima?

A. What day of the week did I arrive?

Q. In Seattle, on the United Airlines?

A. As far as I can remember it seemed like it was Sunday, but I don't remember exactly.

Mr. Freeman. That's all.

The Court: Any other questions? That's all, then.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Olson: Your Honor, I think the witness should be advised that she is still under subpoena.

The Court: Yes, you're still under subpoena, and will remain until excused. That will apply to all the witnesses.

Mr. Olson: The same instruction will apply with reference to discussing her testimony?

The Court: Yes; she's been instructed.

JOHN W. WORSHAM

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows.

Direct Examination

By Mr. Freeman:

Q. Your name, please?

A. John W. Worsham.

Q. And by whom are you employed, Mr. Worsham?

A. Federal Bureau of Investigation.

Q. For how long? [130]

A. Since 1941.

Q. Mr. Worsham, were you assigned to investigate and did you investigate this case?

A. I did.

Q. And in connection with your investigation did you at any time talk to Mr. Chamales?

A. I did.

(Testimony of John W. Worsham.)

Q. When did you first see him, Mr. Worsham?

A. It was on March 6, 1950.

Q. March 6, 1950; did you have a conversation with him at that time about the case?

A. I did.

Q. Was that prior to the filing of any complaint against Mr. Chamales? A. It was.

Q. Tell the jury and court in your own words what you said to Mr. Chamales at that time with reference to his requirement to talk to you or not to talk if he saw fit?

A. Well, the first thing we said to Mr. Chamales, he was told that he did not have to talk to us, that he had a right to cancel the right of talking to us; we told him that there would be no promises, threats or rewards made to him in order to have him talk to us, and that anything he said may be used against him in a court of law.

Q. What was his response to that? [131]

Mr. Olson: Now if your Honor please, we object to any testimony by this witness as to a conversation had with Mr. Chamales or any statements made by Mr. Chamales to him if it's for the purpose of incriminating Mr. Chamales, on the ground—I haven't the slightest idea what it's going to be, but if it's in the nature of a confession or admission that was taken before he was charged with an offense, before he appeared before the court commissioner, and that it is not admissible against him, and on the second ground, that there has been no proof, independent proof of any offense charged, even accepting Mrs.

(Testimony of John W. Worsham.)

Elliott's testimony as true, there has been no independent proof of any transportation with intent, transportation interstate for immoral purposes, her testimony being that the transportation was for the purpose of going to work in the Commercial Hotel, and both of those grounds, not being independent proof, the admissions are not admissible.

The Court: Do you wish to inquire as to whether or not any statements made by Mr. Chamales were voluntary? Do you wish to inquire of this witness on that ground?

Mr. Olson: Yes.

The Court: All right, you may interrogate him if you wish.

Mr. Olson: Is your Honor overruling my objection? [132]

The Court: Yes, I'm overruling your other objection; I'll rule that it's admissible unless you can show it was not voluntary.

Mr. Olson: Then we'll wait for cross-examination.

Q. (By Mr. Freeman): After you told him those things, what was his response?

A. He said he would talk to us.

Q. Who was in the office, if anyone, besides you and Mr. Chamales?

A. Special Agent Eugene P. Clark of the Federal Bureau of Investigation.

Q. At what office did this conversation take place?

(Testimony of John W. Worsham.)

A. The Post Office Building, the F.B.I. office, room 202, in Yakima, Washington.

Q. In your office? A. Yes, sir.

Q. All right, tell the jury what Mr. Chamales said.

Mr. Olson: Your Honor, may I ask a couple of questions?

The Court: Yes, all right.

Voir Dire Examination

By Mr. Olson:

Q. , Mr. Worsham, this was in your office, you say, in Yakima? A. Yes, sir, it was.

Q. Did Mr. Chamales have any attorney present?

A. No, he did not. [133]

Q. There was present yourself and Mr. Gene Clark? A. That's correct.

Q. Both of you employed by the Federal Bureau of Investigation? A. That's correct.

Q. Mr. Chamales? A. That's right.

Q. Anyone else? A. No one else.

Q. Did you have any district attorney present?

A. Not at that time, no, sir.

Q. Did you before talking with him tell him in substance or effect that there wasn't anything to this, that it was a case that you didn't, the F.B.I. didn't bother itself with, and that all you needed from him was a statement verifying that they came out here for their own mutual benefit, and that that would end the matter and he would hear nothing more of it?

A. No, sir, we did not tell him that.

(Testimony of John W. Worsham.)

Q. Either you or Mr. Clark?

A. Not to my knowledge; I did not, and I don't recall Mr. Clark saying that.

Q. Do you recall either you or Mr. Clark saying anything of that nature? A. No, sir. [134]

Q. That it was merely an escapade as far as your office was concerned, one that you would not concern yourself with?

A. No, sir, not in my presence when I was in the office he wasn't informed of any such thing, that it was an escapade that we wouldn't pay any attention to.

Q. If he'd make a statement to you verifying that information that you then had, that there would be nothing to this, and the whole matter would be dropped?

A. That we told Mr. Chamales that?

Q. Yes. A. We did not.

Mr. Olson: That's all, your Honor.

The Court: All right, go ahead with the direct.

Direct Examination

(continued)

By Mr. Freeman:

Q. As a matter of fact, Mr. Worsham, did you not just testify that you told him that anything he said might be used against him?

A. That's right.

Q. Go ahead and tell the court and jury the nature of your conversation with Mr. Chamales that afternoon.

(Testimony of John W. Worsham.)

A. Well, Mr. Chamales stated that he purchased a railroad ticket by Northern Pacific Railroad in Chicago, and he traveled from Chicago to Yakima, Washington, with Miss Elliott using the same compartment, having sexual relations while en route, and upon arriving in Yakima, Washington [135] they stayed at the Commercial Hotel, she stayed there approximately three weeks, he had sexual relations with her during that time. After about three weeks he paid her fare back to Chicago. He stated that a number of calls were made during the time—that was sometime in March of 1949, and there was a number of calls made from Chicago to the Commercial Hotel by Miss Elliott——

Q. After her return to Chicago?

A. After her return to Chicago, and sometime in August of 1949, he sent Miss Elliott a Western Union money order for money, sent the money order to Miss Mahoney in Chicago——

Q. Right there, did he say how much, or where the money was sent from?

A. No, he said he didn't remember the amount of the telegram, the place from which it was sent, or the name he used in sending the money.

Q. Did he say he used his own name?

A. He did not; he said he didn't remember what name he used in sending it.

Q. I see. Go ahead.

A. And that Miss Elliott arrived by United Airlines to Seattle, Washington, and he saw her at the Earl Hotel in Seattle, went up to her room, stayed

(Testimony of John W. Worsham.)

there that night, where he had sexual relations with her. The next day he stated that Elaine Elliott, himself, and Tex Reed [136] traveled to Cle Elum, Washington, by Tex Reed's car, where they picked up Vicky Reed, the wife of Tex Reed, at a house of prostitution, and the four of them traveled to Yakima, Washington, where he stayed—Miss Elliott stayed at the Commercial Hotel that night. The next day was spent at the Rest Haven Motel in Yakima, Washington, where he had relations with Mrs. Elliott. The next day Miss Elliott and Chamales returned to Seattle, Washington, where he registered Miss Elliott at the Wilhard Hotel under the name of Elaine Palmer.

Q. Did you question him as to his marital status during the time these trips were taken?

A. He said that he was married.

Q. He said that he was married?

A. That's correct.

Q. Now, at the registration at the Rest Haven Motel in Yakima, did you ask him whether or not he registered under his own name or some other name?

A. He stated that he had never used his correct name while "shacking up."

Q. Did you ask him——

Mr. Olson: Now, I ask that that answer be stricken, your Honor, as totally unresponsive to the question.

The Court: Read the question again.

(Testimony of John W. Worsham.)

(Whereupon, the Reporter read the last previous [137] completed question.)

The Court: And that's what his response was, which you've given?

A. Yes, sir.

The Court: The motion to strike will be denied.

Q. (By Mr. Freeman): Did you discuss with him the registration of Elaine Elliott in Seattle at the Wilhard Hotel?

A. Yes, sir. He said that he registered her under the name of Elaine Palmer.

Q. Did you ask him why?

A. Well, he didn't state why he did.

Mr. Freeman: You may inquire.

Cross-Examination

By Mr. Olson:

Q. Had you previously discussed the case with Elaine Elliott prior to discussing the matter with Mr. Chamales?

A. Had I previously talked to her?

Q. Yes. A. I had.

Q. And in discussing the matter with Mr. Chamales did he also make statements to you that she was coming out here to work in the hotel?

Q. Did Chamales say that to me?

Q. Yes.

A. Not that I remember at all, that he made a statement that she was to work in the hotel. [138]

(Testimony of John W. Worsham.)

Q. You say that he did tell you after she went back that he had numerous phone calls from her?

A. Yes, he did.

Q. And didn't he say that those phone calls were frequent and persistent?

A. I don't recall whether he said—how many he said she made; however, I do recall that he said they were made collect.

Q. And that there was a very large number of them, and that he was refusing to accept them?

A. I don't recall that.

Q. Don't you remember him telling you that, that she was just calling all the time, and he would tell her "I'm going to China"?

A. I recall that he said she made a number of telephone calls to him collect.

Q. Don't you remember him telling you that he was refusing to accept the calls?

A. It's possible he did say it; I don't remember it.

Q. Did he say he told the telephone operator "Tell her I'm gone to China" and things of that kind?

A. No, I don't recall him saying that at all.

Q. Did he make that statement to you in any of the conversations that you had with him?

A. I do not remember if he did or not. [139]

Q. What?

A. I don't think he did. I don't remember if he did or not.

(Testimony of John W. Worsham.)

Q. You talked to him one time out at your house, didn't you? A. Out at whose house?

Q. At your house? A. No, sir.

Q. Or out at Mr. Chamales' house?

A. No, sir, I think I didn't—I think I did; I was with the United States Marshal when we went out there to his house.

Q. Was that when you arrested him?

A. The Marshal arrested him; I did not.

Q. Did you ever talk to Mr. Chamales between the time that you speak of on March the—I don't remember the date—on March 6, 1950, the conversation that you first related, and the time of his arrest, did you ever talk to him on any other occasion out at his home?

A. No, sir, I did not, except for the time of the arrest is the only time.

Q. What was that last statement?

A. I have never talked to him at his house at any time except the time when the Marshal was there; in fact, I didn't know where he lived until that time.

Q. Did you ever talk to him anyplace except this conversation in your office?

A. Yes, I did; I talked to him in your presence at our [140] office.

Q. That was shortly before he was arrested?

A. If I remember correct, that was March 9th, three days after the first time.

Q. That was when you requested a written statement from him? A. Yes, sir.

Q. Did you ever talk with him any other place?

(Testimony of John W. Worsham.)

A. Not that I recall.

Q. Do you remember being with Mr. Chamales at the V.F.W. Club, having drinks with him?

A. No, sir, I have never had a drink with Mr. Chamales at any club.

Q. Do you remember being with Mr. Chamales and Dick Sullivan at a restaurant or hamburger place someplace?

A. I recall being in the restaurant with another agent and I was introduced to Mr. Chamales and Mr. Sullivan.

Q. Who were you introduced by?

A. Who was I introduced by?

Q. Yes.

A. At that time, special agent Conrad Sedosky of the Federal Bureau of Investigation.

Q. Did you eat together then?

A. We had a sandwich.

Q. Together? A. That's right. [141]

Q. You did talk to him, then, on——

A. That was prior to this.

Q. What?

A. That was prior to—that was before I even—that was the first time I knew Mr. Chamales, prior to this incident which you've been questioning me about.

Q. Now, you weren't present when Mrs. Elliott complained to the Federal Bureau of Investigation?

A. Yes, sir, I was.

Q. Oh, you were in Seattle? A. I was.

Q. Did she make the complaint to you?

(Testimony of John W. Worsham.)

A. Yes, sir, to myself and Leo Reuther, a special agent of the F.B.I.

Q. You are in the Yakima office, are you not?

A. That is correct.

Q. You just happened to be in Seattle?

A. That's right.

Q. Then the case was assigned to you for investigation?

A. It was.

Q. Mr. Worsham, when Mr. Chamales was there talking to you in your office you had no court reporter take down his testimony, his statements, or did you?

A. Pardon?

Q. Was Mr. Chamales' testimony in this interview that you [142] had with him transcribed?

A. Was it transcribed?

Q. Yes.

A. We made notes.

Q. Well, was it taken down by a court reporter or by a wire recorder?

A. No, sir, it was not.

Q. And your testimony then is based on your recollection?—

A. That's correct.

Q. Of the interview that you had with him last March 6th?

A. That's correct.

Mr. Olson: That's all.

Redirect Examination

By Mr. Freeman:

Q. I understand, Mr. Worsham, that when you saw Mr. Chamales at a restaurant and had lunch or a sandwich with him you were introduced to Mr. Chamales by your agent Sedosky, that was before you had any knowledge of this case whatsoever?

(Testimony of John W. Worsham.)

A. That's correct.

Mr. Freeman: That's all.

Recross-Examination

By Mr. Olson:

Q. This trip back to Yakima from Seattle, that was in Mr. Reed's car, is that correct?

A. That's what Mr. Chamales told us.

Mr. Olson: That's all. [143]

(Whereupon, there being no further questions the witness was excused.)

(Noon recess.)

(All parties present as before, and the trial was resumed.)

(Whereupon, the following proceedings were had without the presence of the jury.)

Mr. Olson: Your Honor please, I have a witness, Mr. Clay Carroll, who has just arrived from Yakima and whom I saw this noon; I thought I should bring him to your Honor for instructions. I have him right outside the door.

The Court: Yes, if you'll ask him to come in.

Mr. Freeman: Your Honor, I take it that there's no objection to his testifying later in the afternoon; my thought is this, that I can finish later this afternoon.

The Court: He wasn't asking to put him on the witness stand.

Mr. Freeman: Oh, I'm sorry.

(Testimony of John W. Worsham.)

Mr. Olson: I had suggested to Mr. Freeman the possibility of putting him on now; Mr. Freeman said he thought he would finish shortly. If it looks like we can't, then I think Mr. Freeman will be willing to put him on out of order.

The Court: You can put him on out of order if it's [144] necessary to get him away today. You may just remain standing there, Mr. Carroll. The purpose of having you come in was to instruct you that the rule has been invoked that witnesses are to be excluded from the courtroom except when they're brought in to testify, and also you should not discuss with any other witness what your testimony is to be, and after you leave the stand don't tell any other witness what you have testified. That's all, then. Bring in the jury.

(Whereupon, the following proceedings were had within the presence of the jury.)

WILBUR R. GREEN

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Freeman:

(Whereupon, request for Western Union money order was marked Plaintiff's Exhibit No. 11 for identification.)

(Whereupon, Western Union money order was marked Plaintiff's Exhibit No. 12 for identification.)

(Testimony of Wilbur R. Green.)

Q. Will you give the Court and jury your name, please? A. Wilbur R. Green.

Q. And you are a resident of Spokane?

A. Spokane, Washington.

Q. What is your occupation?

A. Superintendent of the Western Union Telegraph Company. [145]

Q. At Spokane? A. At Spokane.

Q. Mr. Green, handing you plaintiff's identification 11, will you examine that and tell us what that is?

A. It is an original money order application made at Tacoma, Washington, on August 13, 1949, for a money order to Chicago.

Q. Through the Western Union?

A. Through the Western Union.

Q. Is that the original application?

A. This is the original application.

Q. And handing you identification 12, will you tell us what that is, please?

A. This is the money order draft issued at Chicago in payment of the money order application filed at Tacoma.

Q. Of the application you have as identification 11? A. Of the original application.

Q. That is also the original? A. Yes.

Q. And who has had the custody of those documents?

A. The Western Union Telegraph Company, accounting department.

Mr. Freeman: You may examine.

(Testimony of Wilbur R. Green.)

Mr. Olson: May I see them?

Mr. Freeman: Yes. I'm not offering them at this time. [146]

Mr. Olson: You're not offering these now?

Mr. Freeman: No, I'll not offer them until the next witness comes forward.

Mr. Olson: We have no questions.

(Whereupon, there being no further questions the witness was excused.)

MARGE G. MAHONEY

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Freeman:

Q. Will you give your name, please?

A. Marge G. Mahoney.

Q. Where do you reside?

A. 7456 South Shore Drive, Chicago.

Q. Are you acquainted with Elaine Elliott?

A. Yes.

Q. Were you a roommate of hers in 1949?

A. Yes.

Q. All of 1949, the entire year?

A. No, not the entire year.

Q. In August of 1949? A. Yes.

Q. At 7456 Lake Shore Drive?

A. South Shore Drive.

Q. I see. Handing you plaintiff's identification

(Testimony of Marge G. Mahoney.)

11, Miss Mahoney, will you examine that and tell us what that is? [147]

A. This is a telegraphic money order that was sent to me for Elaine on the night of August 13.

Q. At Chicago?

A. At Chicago, from Tacoma.

Q. And handing you Plaintiff's identification 12, will you examine that and tell us what that is?

A. That's my signature on the back; that's the check they gave me for \$125.00.

Q. In connection with the money order?

A. Yes, it is.

Mr. Freeman: We offer those in evidence at this time, if your Honor please.

Mr. Olson: I don't think they've been properly identified, but we will not object.

The Court: They will be admitted.

(Whereupon, Plaintiff's Exhibits No. 11 and 12 for identification were admitted in evidence.)

Q. (By Mr. Freeman): Miss Mahoney, do you know who sent that money?

A. It was sent under the name of Tom Chambers, but we asked to claim it under the name of Tom Chamales.

Mr. Freeman: That's all.

Cross-Examination

By Mr. Olson:

Q. What was that last?

A. It was sent under the name of Tom Chambers,

(Testimony of Marge G. Mahoney.)

but we went [148] down to claim it under the name of Tom Chamales. We received the notice from the Western Union to go down and claim the money order that was there for me for \$125.00, and they asked whose name was on it, and we said we were expecting it from Tom Chamales, and they asked if it was under any other name, and we said we didn't know, and finally the man told us it was from Tom Chambers.

Mr. Freeman: One more question; what did you do with the \$125.00?

A. I handed it to Elaine right in the telegraph office.

Q. (By Mr. Olson): Did you go with her to the airport?

A. Yes, a friend and I took her to the airport and put her on the plane.

Q. That same night?

A. That same night; she bought a ticket with that money.

Q. Are you married—is it Miss or Mrs. Mahoney? A. Miss Mahoney.

Q. Miss Mahoney, you say that Elaine Elliott and you were roommates? A. Yes.

Q. And at 7546—— A. 7456.

Q. 7456 South Shore Drive in Chicago?

A. Yes.

Q. During 1949. What period was that that you were roommates [149] together?

A. I believe Elaine moved in in May.

Q. May of 1949? A. Yes.

(Testimony of Marge G. Mahoney.)

Q. Are you roommates now?

A. No, we're not.

Q. From May, 1949, the rest of that year were you roommates?

A. No. After she got back from the trip Elaine didn't live with me.

Q. Has she been a roommate of yours since she returned from Yakima at all? A. No.

Q. But she was your roommate continuously from May of 1949 up until the time she made the trip? A. I didn't hear you.

Q. She was your roommate, then, I take it, from May of 1949 until the time that she did make the trip out to Yakima? A. That's right.

Mr. Olson: That's all, your Honor.

Mr. Freeman: That's all.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Freeman: Did I understand your Honor is admitting the exhibits?

The Court: Yes, 11 and 12 have been [150] admitted.

EVERT NELSON

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Freeman:

(Whereupon, original registration card at

(Testimony of Evert Nelson.)

Earl Hotel was marked Plaintiff's Exhibit No. 13 for identification.)

Q. Your name, please? A. Evert Nelson.

Q. Where do you reside, Mr. Nelson?

A. Seattle, Washington.

Q. What was your occupation in August of 1949?

A. Hotel clerk.

Q. Where? A. The Earl Hotel, Seattle.

Q. Mr. Nelson, I'll hand you plaintiff's identification 13 and ask you to examine that, please. Will you tell us what that is?

A. That's a registration card for the Earl Hotel.

Q. Of what date?

A. It's August 14, 1949.

Q. For whom? A. Elaine Elliott.

Q. Did you take that registration?

A. I registered the party.

Q. You registered the party. The card is from your official [151] records? A. Yes, it is.

Q. That's your original registration card?

A. That's the original registration card, with the account on this side.

Mr. Freeman: We offer it in evidence.

Mr. Olson: We have no objection.

The Court: It will be admitted.

(Whereupon, Plaintiff's Exhibit No. 13 for identification was admitted in evidence.)

Mr. Freeman: No further examination of this witness.

Mr. Olson: We have no questions.

(Testimony of Evert Nelson.)

(Whereupon, there being no further questions, the witness was excused.)

A. L. RICHMOND

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Freeman:

(Whereupon, original registration card at Wilhard Hotel was marked Plaintiff's Exhibit No. 14 for identification.)

Q. Will you give us your name, please?

A. A. L. Richmond.

Q. And what is your occupation?

A. Manager of the Hotel Wilhard, Seattle. [152]

Q. And were you in that capacity in August of 1949?

A. I was.

Q. Handing you plaintiff's identification 14, Mr. Richmond, will you examine that and tell us what it is, please?

A. It's a registration card for room 235 in the Hotel Wilhard.

Q. What is the name on the registration?

A. Mrs. Elaine Palmer.

Q. For what date?

A. August 17, 1949.

Q. Is that your permanent record?

A. That's a permanent record of the hotel.

Q. Your original record?

A. Yes, sir.

(Testimony of A. L. Richmond.)

Mr. Olson: May I ask a couple of questions, your Honor?

The Court: Yes.

Voir Dire Examination

By Mr. Olson:

Q. Did you take this registration, Mr. Richmond? A. I did not.

Q. You don't know whose writing this is, then; you weren't present when this card was signed?

A. I was not.

Mr. Olson: Well, I fail to see the materiality of it, your Honor. Certainly it hasn't been properly identified. [153] There's no one I know of connected with this case whose name is Mrs. Elaine Palmer.

The Court: It's offered, I presume, in corroboration of her testimony. It will be admitted for that purpose. It isn't evidence as to made the registration.

Mr. Olson: No connection with Mr.——

The Court: It simply shows she registered there at that time, as she testified.

Mr. Freeman: That's the purpose.

The Court: It will be admitted.

(Whereupon, Plaintiff's Exhibit No. 14 for identification was admitted in evidence.)

Mr. Olson: I understand it's admitted for the purpose of showing that Elaine Elliott was registered at the hotel—I mean Palmer.

The Court: It merely shows that somebody by

(Testimony of A. L. Richmond.)

the name of Elaine Elliott—or Elaine Palmer, I mean, registered at the hotel at that time.

Mr. Olson: I have no other questions.

The Court: May Mr. Richmond be finally excused?

Mr. Olson: We have no objection.

(Whereupon, there being no further questions, the witness was excused.) [154]

TOM DAWSON

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Freeman:

(Whereupon, original registration card at Rest Haven Motel was marked Plaintiff's Exhibit No. 15 for identification.)

Q. Your name, please? A. Tom Dawson.

Q. What is your occupation, Mr. Dawson?

A. Well, I'm a motel proprietor.

Q. And what motel? A. Rest Haven.

Q. At Yakima? A. Yes.

Q. Were you the proprietor of that motel in August of 1949? A. Yes.

Q. Now, Mr. Dawson, handing you plaintiff's identification 15 I'll ask you to examine that and tell us what it is.

A. It's the registration for a cottage.

The Court: Just a little louder, please.

(Testimony of Tom Dawson.)

A. This is a registration for one of my units, one of my cottages.

Q. One of your motels? A. Yes.

Q. And what is the date of it? [155]

A. The date is August 16, '49.

Q. 1949? A. Yes.

Q. And who is the registration?

A. It's mine; Chamales, I believe.

Q. I think it's R. A. Sullivan, I believe, but you haven't your glasses. That's all right. This is the official registration card? A. Yes.

Mr. Freeman: We offer it for the same purpose as the last.

The Court: Yes, all right.

Voir Dire Examination

By Mr. Olson:

Q. Are you able to read this, or was it the name that surprised you? A. I beg your pardon?

Q. Do you have difficulty reading, Mr. Dawson, without your glasses? A. Yes, I do.

Q. You're not sure, then, just whose name is on this, is that right?

A. Well, no, I would have to have my glasses to say; I'm sorry.

The Court: Where are your glasses?

A. Well, I left them in Yakima. I meant to put them in my [156] pocket.

The Court: Should have subpoenaed the glasses, too.

(Testimony of Tom Dawson.)

Mr. Olson: Well, we won't object to it, your Honor.

The Court: All right, it will be admitted.

(Whereupon, Plaintiff's Exhibit No. 15 for identification was admitted in evidence.)

Mr. Olson: That's all, your Honor.

The Court: May Mr. Dawson be excused, then?

Mr. Olson: I may ask him one question.

Cross-Examination

By Mr. Olson:

Q. Mr. Dawson, you operate the Rest Haven Motel there in Yakima? A. Yes, sir.

Q. And that's located about how far out of the city limits? A. It's a mile.

Q. About a mile from the city limits?

A. Yes.

Q. And in that mile, as far as incoming traffic to Yakima from the north, that's where the motels are all located, especially the nicer ones?

A. Well, I'm beyond the city limits a mile, and I'm on the north side of the river.

Q. But there's a lot of motels all the way in from there on in to the city limits, are there not? [157]

A. Yes, there are.

Q. Your motel, I take it, is a perfectly respectable place? A. Yes, sir.

Mr. Olson: That's all.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Freeman: Call Miss DesCorreau.

Mr. Olson: Your Honor, in view of a proposed instruction of the United States Attorney, I'd like to make a statement to the Court in the absence of the jury with reference to questions which apparently will be propounded to this witness, but in the presence of the witness.

The Court: Yes, all right. The jury may step out for a few minutes.

(Whereupon, the following proceedings were had without the presence of the jury; the witness Betty DesCorreau being present in the courtroom.)

The Court: You have no objection to the witness remaining in during the argument here?

Mr. Olson: No, I haven't, your Honor, because I'm going to ask certain instructions to the witness. The instruction reads as follows: "With relation to the testimony of Betty Dorene DesCorreau, you are instructed to confine the use of her testimony entirely to the question [158] of intent or purpose as it relates to the crimes which are charged in the amended information. Even if you should find that the defendant was immoral or had committed other violations, he is not on trial for those, but you may take the testimony of Betty Dorene DesCorreau with what credibility you give her and determine whether or not that throws any light upon the question of the intent of the defendant as charged in the counts of the amended information."

Now, that instruction would indicate to me at least that the testimony of this witness may relate

to the commission of other crimes which we have discussed and which your Honor has to date ruled out, also it might relate to some admissions of conversations had with the defendant as to matters not involved herein. Now, the reason that I have asked for this recess and this opportunity is that very often counsel will ask a question which is wholly unobjectionable, and yet the answer will come in with this extraneous matter and the jury has heard it, and you can't unhear it. As I say, I don't know what the lady is going to testify to, but the inference is there from that instruction that she will be asked, and I assume in the normal course of events there's nothing whatever wrong about it, that in discussing the matter she knows generally what she's going to be asked [159] about, and in the utmost good faith she may understand the question to be asked to call for some answer as to some other immoral act or some other outside matter, and the answer comes in, and then as I say it's most prejudicial and there's nothing I can do about it.

The Court: Well, I think it's proper at this stage to ask the Assistant United States Attorney what he proposes to prove by this witness, and then if there's any question of the law of evidence involved, we can pass on it.

Mr. Freeman: Do you desire that I make an offer of proof?

The Court: Well, I don't believe it's necessary to make a formal offer of proof, but if you'll just state briefly what you propose to prove by the witness, then I can tentatively rule on whether it's admissible or not.

Mr. Freeman: Your Honor, Miss DesCorreau will testify that she first met and knew Tom T. Chamales in Yakima before the time of this case. She worked for him as a—I think she worked for him as a switchboard operator; that she quit that employment and went to Seattle. I think on the night of somewhere between the 12th and the 13th of August, sometime just before Elaine Elliott was to arrive in Seattle by plane from Chicago, she was called by Thomas T. Chamales in Seattle and [160] asked for a date. She will testify that Tom Chamales came to her apartment and picked her up. In the apartment he told her that a woman was coming in by plane Sunday—now, this took place I think on Friday night, as she will testify—that a woman was coming in by plane Sunday from California. He further told her that he had plans for the woman coming in by plane. He told her the business that he, Tom Chamales, was engaged in. He told her that he was a pimp. He told her in substance how he treated and would treat this girl coming in by plane from Chicago, that is, he told her that his racket was that of a pimp. She will testify that he said to her or told her how pimps treat women that they have prostitution in mind for, that they treat them nice, dine them, wine them and so forth, until they have finally broke them into the rackets. That he told her these plans were also for the woman coming in by plane from California——

The Court: From California or Chicago?

Mr. Freeman: From California. They dined at two night clubs that same evening, that's Friday

night, in Seattle, where the conversation was again repeated both with reference to the woman coming in on the plane, and with reference to the business of Thomas T. Chamales. She will further testify that on the following day, Saturday, Tom Chamales and Reed picked her up and took her to a [161] house of prostitution in Portland. She will further testify that on Sunday—on Saturday she also learned that Tom T. Chamales intended to drive to Yakima. She will testify that on Sunday, by prior arrangement, Chamales was to pick her up at her apartment and take her along with him to Yakima. She will testify that Tom Chamales and Reed drove up to her apartment. Her apartment is on the ground floor of an apartment house in Seattle. Reed was driving the car, Chamales was riding in it, and a woman was riding in the car. The car was parked in front of the apartment house, just outside her window, and she had a free sight of the car and its occupants. She will testify that Chamales came into the apartment and said he could not take her to Yakima, and he said "I have the girl in my car." She asked him if that was the girl who was arriving on the plane from California, and he said "Yes, it is." She will make a positive identification of Elaine Elliott. He further told her that if she repeated in Yakima any of the conversation that he had had with her the day before and that day, that she would receive, I think, a kick in the rear. That's the substance of it.

The Court: This matter of his taking the witness to a house of prostitution in Portland—

Mr. Freeman: In Tacoma; if I said Portland, it was [162] Tacoma.

The Court: To place her there or have her work there?

Mr. Freeman: No, just took her there with him.

The Court: Mr. Olson?

Mr. Olson: Your Honor, that statement, I mean that trip to place her in a house of—or took her to a house of prostitution in Tacoma, assuming he did that, has nothing to do with this.

The Court: I don't believe that would be material, but as to the statements he made as to his intentions with regard to the girl who will be identified as Elaine Elliott—

Mr. Olson: Well, your Honor, certainly as to what he told her—take first the statement he said “I'm a pimp.” That it seems to me certainly is not an admissible statement. Supposing he is? Supposing he was? That has nothing to do with the transportation of Elaine Elliott for immoral purposes. They've got to prove, irrespective of what he is, that Elaine Elliott was transported—

The Court: Yes, but for immoral purposes, and one of the immoral purposes charged is for purposes of prostitution. Isn't it more likely that a pimp would transport a woman for immoral purposes, than a respectable hotel proprietor? [163]

Mr. Olson: Possibly so, your Honor, but by the same token, your Honor, when you get back to what I was arguing before—

The Court: This is the defendant. Elaine Elliott isn't on trial; she's only a witness. This defendant

is on trial, and one of the specific things charged, an essential element of these offenses is the purpose, one of them particularly—well, I guess they both charge purpose of prostitution.

Mr. Olson: But Elaine Elliott's credibility is on trial just as much as the defendant's violation of the statute.

The Court: No, I don't think they're comparable. Here we're trying to determine whether or not this evidence is material on the point of showing the purpose or intent of the defendant, who is on trial and charged here. It isn't a question of credibility.

Mr. Olson: Your Honor, it seems to me if this testimony can come in at all it's got to be one thing; sitting in her apartment looking out the window, seeing somebody sitting in the car, and saying that's the same girl who was in here, now, you have that kind of a——

The Court: That's for the trier of the facts, to determine whether the identification is sufficient or not. If she will testify to the identification then whether or [164] not she is to be believed is a question for the jury, not me.

Mr. Olson: That's true, your Honor.

The Court: I believe it's material, except the matter of the trip to Tacoma.

Mr. Freeman: Your Honor, may I be heard briefly on that?

The Court: Yes.

(Argument of plaintiff's counsel.)

The Court: I'll rule that part of it out. You may call in the jury, then.

(Whereupon, the following proceedings were had within the presence of the jury.)

BETTY DesCORREAU

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Freeman:

Q. Will you give us your name, please?

A. Betty DesCorrean.

Q. I'm sure you'll have to speak a little louder; and where do you now reside, Miss DesCorrean?

A. In Yakima, Washington.

Q. You've been a resident of Yakima for a considerable time? A. Yes.

Q. Are you acquainted with Thomas T. Chamales, Jr., the defendant here on trial? [165]

A. Yes, I am.

Q. Where and when did you first meet him, approximately?

A. When I worked for him; I think it was in 1946.

Q. In 1946? A. Or '47.

Q. And where did you work for him?

A. At his hotel; I was the switchboard operator.

Q. Which hotel?

A. Commercial Hotel in Yakima.

Q. In Yakima; how long did you work for him, Miss DesCorrean?

A. I should say around two or three weeks.

Q. I see. Then in 1949, sometime in 1949, I take

(Testimony of Betty DesCorreau.)

it you moved to Seattle, is that correct?

A. Yes, I did.

Q. Did you hear from Tom T. Chamales, Jr., in Seattle? A. Yes.

Q. And tell us how he came in contact with you. Mr. Olson: I'd like to have the time and place.

Q. I will. When did he get in touch with you in Seattle?

A. I had been there about I should say a month, and he contacted me by telephone.

Q. Now, about what month or day or year was it?

A. It was in the first part of October—or August.

Q. First part of August? A. Yes. [166]

Q. Of what year? A. Of 1949.

Q. And where were you when he called you?

A. I was at my apartment, at the Keystone Apartments in Seattle.

Q. And what was the conversation?

A. He asked me out for the evening.

Q. He asked you out for the evening?

A. Yes.

Q. And what did you say or do?

A. I said I would go.

Q. Did you see him, then, as the result of that conversation?

A. He came to my house that evening.

Q. All right, what conversation did you have with him that evening?

A. Well, the first thing he said, of course, it was

(Testimony of Betty DesCorrean.)

“hello” and “how are you” and then he sat down and said, “Betty, I’d like to tell you something.”

Q. Now, speak a little louder.

A. He said, “Betty, I would like to tell you something”——

The Court: In view of the discussion we had here I think the record should show this is over the objection of the defendant.

A. He said, “Betty, I’m a pimp, and I think you should know this, seeing as how you’re a nice kid and I wouldn’t want [167] anything to happen to you, and I’m going to tell you all about it.”

Q. Did he make mention to you at your apartment of a girl coming in from California?

Mr. Olson: Your Honor, just a minute, I think that question is most leading.

The Court: I’ll sustain the objection.

Mr. Olson: And having made the suggestion that she should not be permitted to answer the question, in accordance with the rule.

The Court: Well, you may ask another question.

Q. (By Mr. Freeman): What further conversation did you have with him that evening, Miss DesCorrean?

A. He told me what sort of racket he was in.

Q. What did he say to you in that regard?

A. He said that he had a few girls that he had working for him, and that he had one coming in Sunday evening.

Q. Did he say from where?

A. He said from California.

(Testimony of Betty DesCorreanu.)

Q. Did he say how? A. By plane.

Q. Did he tell you what work these girls were doing for him?

A. Well, I just took it for granted that they were prostitutes.

Mr. Olson: Now, just a minute. I object to what she took for granted, your Honor. [168]

The Court: Yes, I'll sustain the objection to that.

Q. What other conversation did you have with him, Miss DesCorreanu?

A. Well, he told me about Elaine Elliott, but he didn't mention her name.

Mr. Olson: Then, your Honor, I ask that that be stricken.

The Court: Yes, that will be stricken, and the jury will disregard it at this time.

Q. What conversation did he have about the girl you were speaking about a moment ago?

A. That she was coming in by plane Sunday evening, and that he was to meet her by plane, and he said the first thing he was going to do was slap her in the face to show her who was boss.

Q. You said meet her by plane, or at the plane?

A. At the plane.

Q. Go ahead.

A. And he said the first thing he was going to do was to slap her in the face to show her who was boss, and then he said he was going to put her in a low house of prostitution, and after that he was going to put her in a lower one so she would get

(Testimony of Betty DesCorrean.)

to know the business, but he said after about six months that he would put her up in [169] business of her own.

Q. Was there any other conversation along that line with Mr. Chamales at your apartment that evening?

A. He talked a lot about prostitution.

Q. I see.

A. And how they got these girls to do things for them.

Q. Now, just go into that and tell us what he's told you.

A. He told me that first he treats them very wonderfully, sends them flowers and takes them out and all sorts of intentions, and then they had this thing that's planned where he has an apartment, maybe, or something like a house, and he would have several good-looking friends in where they would ignore the girl when she came in, when she is used to all sorts of attention; she is probably a beautiful girl to begin with, or pretty, until the time that he would—the expression he used was get his hook in their belly, and they would do whatever he wanted them to do.

Q. Did you go out with him that evening, Miss DesCorrean? A. Yes, I did.

Q. Where did you go?

A. The Outrigger Club.

Q. Where is that?

A. That's in the Ben Franklin Hotel.

Q. Where?

(Testimony of Betty DesCorrean.)

A. The Benjamin Franklin Hotel. [170]

Q. Did you have dinner with him there?

A. Yes, I did.

Q. What was the conversation that you had with him there?

A. Well, it was just everything, I can't remember any definite thing.

Q. I'm speaking now of similar conversation.

A. Of Elaine Elliott, or this girl.

Q. Of the girl coming in from California?

A. I don't believe he talked any more about her in there.

Q. Did he tell you more about his business at the club, the Outrigger Club? A. No.

Q. Did you go to another club? A. Yes.

Q. What conversation did you have with him there?

A. Just the general run of the business.

Q. Of what business, that's what I'm getting at.

A. Of course, we were with other people then and we didn't talk too much about it.

Q. Now, did he say anything more to you than you have already stated about his business that you can recall, at your apartment that night or at the restaurant afterwards?

A. Not that I can recall.

Q. Now, when did you next see Mr. Chamales?

A. It was the next evening. [171]

Q. The next evening? A. Yes.

Q. And where was that?

A. That was at my apartment.

(Testimony of Betty DesCorreau.)

Q. At your apartment? A. Yes.

Q. Did you dine with him that night?

A. Yes.

Q. What was the conversation, if any, that night?

A. That was when he wanted me to go to Tacoma with him.

Q. I see; and when did you next see him after that?

A. The next evening, it was Sunday evening, we went for a ride.

Q. Sunday evening? A. Yes.

Q. And was there anything said about the girl coming in on the plane that evening? A. Yes.

Mr. Olson: Now, your Honor, I think he should ask what conversation they had.

The Court: Well, directed to a particular subject, so she won't have to relate everything they said. Go ahead; overrule the objection.

Q. (By Mr. Freeman): What was the conversation with reference to the girl? [172]

A. Well, he said he had to meet that girl that evening at the airport, and he again said that the first thing he was going to do was slap her in the face, and that she would love him all the more for it if he did.

Q. Did he repeat on that occasion what he had stated before to you in that regard?

A. No, I don't believe so.

Mr. Olson: Your Honor—

The Court: Well, she said no.

(Testimony of Betty DesCorreau.)

Q. All right, Miss DesCorreau, did you have any conversation with Mr. Chamales about riding with him to Tacoma?

A. Did I have any conversation?

Mr. Olson: To Tacoma?

Q. I'm sorry; Yakima.

A. Yes, he mentioned going to Yakima the first of the week, and I didn't see him; I called him, but he wasn't in, and he came down to my apartment and I asked him then if my girl friend, my roommate and I could ride over with him to Yakima, and he said no, that we couldn't, that he had to leave town right now, and that they were waiting for him outside.

Q. When was this, now, what day was this, do you recall?

A. This was Tuesday or Wednesday.

Q. The Tuesday or Wednesday following the Sunday when the girl was to come in? [173]

A. Yes, it was during that week some time.

Q. I see. Now, go ahead and tell us what happened on that date.

A. He had told me about the girl, so I was quite anxious to see her, as he said she was a very pretty girl, and I just wanted to know what she looked like, so our apartment was right on the sidewalk, so it was just the width of the sidewalk between——

Mr. Olson: The question wasn't what mental thought went through her mind.

The Court: Well, what was the question?

(Testimony of Betty DesCorreau.)

(Whereupon, the reporter read the last previous question.)

The Court: I'll overrule the objection. She may tell what happened.

Q. (By Mr. Freeman): Go ahead.

A. Anyway, I went to the window.

Q. You went to the window?

A. I went to the window; he was right beside me, and I looked out of the window and I saw the side view of this girl.

Q. Now, who else was in the car?

A. Tex Reed.

Q. And what conversation did you have with Chamales?

A. I asked him if that was the girl that he was speaking of, [174] and he said yes, it was.

Q. He said it was? A. Yes.

Q. What other conversation did you have with him then?

A. That was just about all, because he was in a hurry, and he said that he couldn't take us over because he had business on the way.

Q. Is that all the conversation he had with you before he left? A. Yes.

Q. Did he make any statement to you about what might happen if you spoke about certain things in Yakima?

A. Well, as he was going out the door.

Q. Yes, tell us about that.

A. He looked back and said, "Now, if I get back to Yakima and hear anything that I said re-

(Testimony of Betty DesCorreau.)

peated," he said, "I'll come back and knock you on your fanny."

Q. Now, how old were you in August of 1949?

A. Seventeen.

Q. Seventeen years old? You may inquire.

Cross-Examination

By Mr. Olson:

Q. Are you married? A. No, I'm not.

Mr. Freeman: Just a moment, may I ask one more question? [175]

Mr. Olson: Surely.

Mr. Freeman: The girl you saw in the automobile have you now been able to identify?

A. Yes, I did.

Mr. Freeman: Who is she?

A. Elaine Elliott.

Mr. Freeman: She is Elaine Elliott?

A. Yes.

Mr. Freeman: And you now know Elaine Elliott? A. Yes.

Mr. Freeman: That's all; I'm sorry, your Honor.

The Court: All right, you may cross-examine.

Cross-Examination

(Continued)

By Mr. Olson:

Q. You say that you worked in the hotel in Yakima, the Commercial Hotel? A. Yes.

Q. And you say—whose hotel was that?

(Testimony of Betty DesCorreau.)

A. Tom Chamales. I guess it was his father's, but he was the manager of it.

Q. When did you work there?

A. Well, I believe it was in 1946 or 1947.

Q. Can you tell us which one of those years it was?

A. No, I can't definitely.

Q. Do you know when Mr. Chamales' father acquired the hotel?

A. Well, I worked there before he did acquire the hotel. [176] That, I believe, was in '46.

Q. As a matter of fact, the Chamales family didn't have anything to do with the hotel at all in '46, did they?

A. I really don't know.

Q. Are you sure you worked there at all when the Chamales family had it?

A. Yes, I am very sure that I worked there.

Q. Well, I mean when the Chamales family were operating the hotel, are you sure you worked there then?

A. Yes, I am.

Q. And for how long a period of time?

A. I believe it was two or three weeks.

Q. Where was your home at that time?

A. It was with my mother.

Q. Whereabouts?

A. North Third Avenue.

Q. Well, I mean what city?

A. Yakima.

Q. And when did you leave Yakima then?

A. Well, I left there several times. I left it in '47.

Q. '47?

(Testimony of Betty DesCorrean.)

A. Well, I can't remember the dates now when I did leave.

Q. You went to Seattle, did you? A. Yes.

Q. Did you seek employment there? [177]

A. Yes.

Q. What kind of employment?

A. Well, the first time I went I didn't seek employment; I stayed with my grandmother.

Q. How long was that?

A. That I lived with my grandmother? It was one summer.

Q. Then did you come back to Yakima again?

A. Yes.

Q. And how long did you stay back in Yakima that time? A. I don't remember.

Q. You didn't see Mr. Chamales, I understand, at all during that time? A. No.

Q. And then you went back to Seattle again?

A. Yes.

Q. Do you know about what time that was?

A. It was in '48.

Q. Did you seek employment then?

A. Yes.

Q. And whereabouts?

A. At Best's Apparel.

Q. That's a ladies' wear store in Seattle?

A. Ladies' apparel, yes.

Q. And did you work in that place, then, up until the time that you've related of meeting Mr. Chamales? [178]

A. Well, I worked, and I exchanged jobs, I

(Testimony of Betty DesCorreau.)

worked for a Dr. Torreson, and that was about two weeks before the time that I met Tom.

Q. And when you were back this last time, then, after the summer you stayed with your grandmother, where did you stay then? Did you stay with your grandmother again, or in this apartment?

A. Yes, I did.

Q. When did you move into this apartment you spoke of? A. It was in July of 1949.

Q. And I didn't get the address of that apartment. A. It was the Keystone Apartments.

Q. What's the address of it?

A. Well, it was on Terry between Pine and Pike; I don't know the exact address.

Q. On Terry Street? A. Yes.

Q. Do you know what block it's in at all?

A. 1500.

Q. How long did you occupy that apartment?

A. About two months, three months.

Q. Did you occupy it alone? A. No.

Q. Who else was with you?

A. Miss Pat Griswold. [179]

Q. Griswold? A. Griswold.

Q. Was she with you, staying with you in the apartment, when Tom called on you?

A. Yes, she was.

Q. Was she present? A. Pardon?

Q. Was she present?

A. The first evening when he came I don't believe she was.

(Testimony of Betty DesCorreau.)

Q. Was she present the next time, the second time?

A. The next evening she went out with Tex Reed.

Q. And was she present the time that you related that they were on their way to Yakima?

A. Yes, she was.

Q. Well, then, when you saw Mr. Chamales and he called you on the phone, can you fix the date that was in 1949? You say it was August, 1949, is that right?

A. Yes; it was the first part, or around the 14th or 15th.

Q. Around the 14th or 15th; how do you fix that date? A. Well, I don't definitely know——

Q. Well, how? A. ——what date it was.

Q. You say you don't definitely know?

A. No, I don't.

Q. Can you say it wasn't July, 1949? [180]

A. I know it wasn't July.

Q. How do you know it wasn't July?

A. Because I came to that apartment the first part of July and I know I had been there at least a month before he called.

Q. Could you have been there two months?

A. No, it was still summer.

Q. It couldn't have been in September?

A. No, it wasn't.

Q. Then what kind of an apartment is that, how many rooms?

A. It's an apartment hotel; there are six floors.

(Testimony of Betty DesCorreau.)

Q. It's an apartment hotel? A. Yes.

Q. What did your apartment consist of?

A. A bedroom, living room, kitchenette, and bath.

Q. A bedroom, living room, kitchenette, and bath? A. Yes.

Q. And it's on the first floor? A. Yes.

Q. And where is the living room and kitchen and bath? How are the rooms arranged?

A. The living room is right on the street, it's facing the street, as is the bedroom.

Q. Which street, by the way?

A. Terry Street. [181]

Q. Then the kitchen and bathroom, where are they?

A. The kitchen and bath were towards the rear of the building; there were no windows.

Q. Is the bedroom also on the street?

A. Yes.

Q. Now, what's the nature of the living room windows?

A. They covered most of the side of the wall; two large windows, and two half windows, they call them, on the sides.

Q. There was two large windows and two half windows? A. Yes.

Q. By that you mean a large window and a half window above it? A. No, on the side of it.

Q. Then there was four windows on the side of this? A. Yes.

(Testimony of Betty DesCorreau.)

Q. What's the size of the living room, approximately the measurements of it?

A. I really couldn't say. It wasn't too large a room.

Q. Are you telling the jury there was windows clear from one corner to the other?

A. No, I'm not saying that; it took up most of one-half of the wall, or one part of the wall. There wasn't over, I should say, three feet on each side of it.

Q. Did you have curtains on the windows? [182]

A. Pardon?

Q. Did you have curtains on the windows?

A. Yes.

Q. What else?

A. That was all. We had drapes on the sides.

Q. Curtains and drapes? A. Yes.

Q. Did you have any blinds?

A. Well, they were raised.

Q. Pardon?

A. They were raised. We did have blinds, yes.

Q. Were they Venetian blinds or——

Mr. Freeman: Your Honor, I'm going to object to the questioning; she has said she could see. I hardly think the makeup of the room is of sufficient importance.

Mr. Olson: Well, I'm not bound by it.

The Court: I'll overrule the objection. What was the last question?

(Testimony of Betty DesCorreau.)

(Whereupon, the reporter read the last previous question.)

A. No.

Q. Now, as I understand it, you hadn't seen Mr. Chamales since 1946 or 1947, you're not sure which?

A. Well, I had seen him in town.

Q. Oh, you had seen him? [183]

A. To say hello to, yes, but not more than that.

Q. Anything other than just hello?

A. Not that I can remember.

Q. Did you go out with him at all?

A. No, I don't believe so.

Q. And while you were at the hotel you worked there two or three weeks——

A. Yes.

Q. While he was there? A. Yes.

Q. And he didn't go out with you?

A. No.

Q. That was entirely an employer-employee relationship?

A. Well, we were friends, I mean we would talk.

Q. Well, I suppose he talked with all the employees, but you never went out together?

A. No.

Q. And that was in either '46 or '47?

A. Yes.

Q. And then from that time up until the time he called you in '49 how many times did you see him at all to say hello to?

A. Well, I can't remember that.

Q. Well, is it more than once?

(Testimony of Betty DesCorrean.)

A. Well, I should say so. [184]

Q. Do you have any recollection of any time you met him during that three-year period?

A. Well, one time I was in his coffee shop having a cup of coffee——

Q. In Yakima?

A. Yes, and he asked me to work for him; he had a candlelight room then, it was a cocktail lounge in the evening and coffee shop during the day, and he asked me how old I was, and I said twenty-one, and I went back later and told him I was not twenty-one and couldn't work in his coffee shop.

Q. All right, when was that?

A. That was during the summer some time.

Q. Of what year?

A. I believe it was in '48.

Q. Now, what other time can you remember seeing him in that three-year period?

A. Well, that day I went to his suite to have a drink with him, and Tex Reed and this other fellow was up there.

Q. When was that?

A. That was this same day during the summer, I believe it was in '48.

Q. That was the same day we were talking about——

A. ——the job.

Q. ——in 1948? [185]

A. Yes.

Q. Now, can you ever remember seeing him again between that and——

A. Not that I can remember.

(Testimony of Betty DesCorreau.)

Q. So you can remember then this one occasion in that three-year period from the two or three weeks you worked for him at the hotel up until you say he called you at the apartment?

A. Yes.

Q. And then you say he walked in that night and says, "Betty, I want to tell you something"?

A. Yes.

Q. And right off the bat he said, "Betty, I want you to know I'm a pimp"?

A. Yes.

Q. That's what he said?

A. Yes.

Q. And then the next thing the conversation went into matters of prostitution?

A. Yes; I didn't know what the word meant, and I asked him.

Q. You didn't know what the word meant?

A. Yes.

Q. But you sat down and discussed——

A. And he explained to me what the word "pimp" was.

Q. How about prostitute? You knew what that meant? [186]

A. Yes, I did.

Q. And you sat down and carried on that conversation with him in your apartment?

A. Yes.

Q. And following that conversation which you say took place you then went out for the evening?

A. Yes.

Q. Is that what you're telling us?

A. Yes, I am.

(Testimony of Betty DesCorrean.)

Q. And then you came home and went out with him again the next night? A. Yes.

Q. And again the next night? A. Yes.

Q. Now, during all that time did he make any improper advances to you? A. No, he did not.

Q. Of any kind? A. No.

Q. Treated you courteously——

A. He was very nice.

Q. ——and politely in every respect?

A. Yes.

Q. But still he had this conversation with you?

A. Yes. [187]

Q. Now, then, you wanted to come to Yakima with him? A. Yes, I did.

Q. And can you tell us what day of the week it was that this car drove up that you said you looked out the window?

A. I don't know what day particularly it was; it was during the week some time.

Q. Can you tell us any day of the week that it wasn't? A. No.

Q. It could have been any day of the week?

A. Yes.

Q. What time of the day was it?

A. It was afternoon.

Q. In the afternoon? A. Yes.

Q. Was it on Sunday?

A. Was it on Sunday?

Q. Yes.

A. No, it wasn't on Sunday.

Q. Well, you were working, weren't you?

(Testimony of Betty DesCorrean.)

A. No, I wasn't.

Q. I thought you told us you worked in an apparel shop?

A. Well, I did, but I wasn't working at that time.

Q. Were you unemployed at that time?

A. Yes.

Q. How long had you been unemployed? [188]

A. I don't remember how long I had been unemployed.

Q. So then you looked out the window anyhow, Mr. Chamales came into the apartment?

A. Yes.

Q. And you and he looked out the window?

A. Yes.

Q. What kind of a car did you see?

A. A blue Cadillac.

Q. A blue Cadillac automobile? A. Yes.

Q. Do you know what year it was?

A. 1949.

Q. The year of the car? A. No, I don't.

The Court: The year model, you mean?

Mr. Olson: Yes.

The Court: Would you expect her to know that?

Mr. Olson: Well, I wouldn't know, Judge.

Q. Had you been in this car before?

A. Yes.

Q. And it was a sedan, was it? A. Yes.

Q. What time of the afternoon was it?

A. I don't know what time it was.

(Testimony of Betty DesCorreau.)

Q. Do you know whether it was the latter part of the [189] afternoon or the early part?

A. No, it was in the early part of the afternoon.

Q. The early part of the afternoon?

A. Yes.

Q. What was the weather? A. Pardon?

Q. What was the condition of the weather? Was it raining or was the sun out or what?

A. No, the sun was barely shining; it wasn't a real sunshiny day, but it was shining.

Q. What was the situation with reference to shrubbery or trees or bushes around your apartment house there?

A. We had them on each side of the window, and they were cut below our window.

Q. They were on either side of the window but below the window they were cut? A. Yes.

Q. Now, what Mr. Chamales told you, that there was a girl coming from California, as I understand?

A. Yes.

Q. He didn't say Chicago? A. No.

Q. You're sure of that? A. I'm very sure.

Q. Did you remember asking Mr. Chamales to loan you \$100.00? [190] A. It was \$80.00.

Mr. Freeman: I think the date of that should be established to some degree.

Mr. Olson: Well, I'll get at it.

The Court: Yes, I think you should fix the time and place.

Mr. Olson: Should I ask her that first?

(Testimony of Betty DesCorreau.)

The Court: No, if she says she remembers it, that's all right.

Q. (By Mr. Olson): You do remember asking Mr. Chamales for a loan? A. Yes.

Q. And he refused to give it to you?

A. No, he didn't refuse to give it to me.

Q. He didn't give you a loan, did he?

A. No.

Q. And you told him that you needed the money to pay your rent, or something? A. Yes.

Mr. Freeman: Your Honor please, I object to the line of questioning. I see no materiality to the question being asked. Whether a loan or a request for a loan has any purpose——

The Court: Well, I'll overrule it. Trying to show bias, I suppose? [191]

Mr. Olson: Yes.

Q. (By Mr. Olson): Didn't you tell him, Miss DesCorreau, when he refused to make you that loan, that you were going to get him?

A. No, I didn't tell him that.

Q. You don't remember telling him that?

A. No, I don't.

Q. You remember asking him for the money?

A. Yes, I do.

Q. You remember not getting it?

A. Yes; I couldn't talk to him; he left the building.

Q. You don't remember telling him when he refused to give it to you that you were going to get him?

(Testimony of Betty DesCorrean.)

A. I couldn't talk to him; he left the building. When he saw I was there to get the money he left.

Q. Did you write him a letter?

A. I wrote him a note.

Q. Did you say in the note you were going to get him? A. I didn't say that.

Q. What did you say?

A. I said when I make a promise, I expect them to keep it, and what I meant by a promise, I wasn't going to keep quiet about what I knew as far as telling any of my friends anything in Yakima.

Q. Didn't you in that same note tell him you were going to [192] do everything you could to degrade him? A. Not that I remember.

Q. Would you say you didn't say that in your note?

A. I'm not saying I didn't say it; I just don't remember.

Q. Is it possible you said that in the note? Is that your testimony?

A. It's possible if I don't remember.

Q. As a matter of fact you're quite sure you did say that? A. No, I'm not.

Q. Now, Miss DesCorrean, you are presently working in Yakima, are you not?

A. Yes, I am.

Q. In a men's shop? A. Yes.

Q. Located approximately a half a block from where my office is? A. Yes.

Q. And do you recall my calling on you a few days ago at the place of your employment?

(Testimony of Betty DesCorreau.)

A. Yes, I do.

Q. On two occasions? A. Yes.

Q. And asking you if you would discuss—that I had understood that the Federal Bureau of Investigation had talked with you, and also understood that you were going to be a [193] witness, and told you I would like to discuss the case with you? A. Yes.

Q. And you refused to talk?

Mr. Freeman: Just a moment; if your Honor please, he has asked her whether she refused to discuss this case with Mr. Olson. I can't see the relevancy or materiality of that; she was under no compulsion or duty to discuss the case with him.

The Court: One of the witnesses is in the courtroom. Had you planned to call her again?

Mr. Freeman: No, your Honor; I didn't see her there.

The Court: You're not going to call her again?

Mr. Freeman: No. She's from Chicago. Can she be excused, your Honor?

The Court: Do you wish to keep her any longer?

Mr. Olson: I don't believe she should be released, your Honor. Perhaps she ought to stay out of the courtroom.

The Court: Well, if she's not going to be released she shouldn't be in the courtroom, then. I think she should be excluded from the courtroom, because if she's going to be kept it would be only for one purpose.

(Testimony of Betty DesCorreau.)

Mr. Olson: I just can't say definitely that she might not be recalled. [194]

The Court: All right. I'll overrule this objection. Go ahead.

Q. (By Mr. Olson): You did refuse to discuss the case with me? A. Yes, I did.

Q. And I told you that I would be very willing to discuss it with you in the presence of the F.B.I. agent? A. Yes.

Q. Do you recall that?

A. Yes, I recall it.

Q. Or the United States Attorney?

A. Yes.

Q. Or both of them? A. Yes.

Q. And you said that you did not wish to discuss the case with me? A. Yes.

Q. Now, was it your—was your reason for refusing to do that, Miss DesCorreau, that you didn't want me to check on your statement? A. No.

Mr. Freeman: Your Honor, I object for the same reason, it has no materiality in this case.

The Court: Well, she's already answered; I'll overrule the objection. You said no?

A. Yes. [195]

Q. And I called on you twice? A. Yes.

Q. Each time you refused to discuss it with me? A. Yes.

Q. And I also told you my name, who I was representing, and where my office was?

A. Yes.

Q. And I also told you that I was only interested

(Testimony of Betty DesCorreau.)

in securing what the actual facts of this case was concerned? A. Yes.

Q. I told you also that if I asked you any questions that you didn't wish to answer, that you could tell me that you didn't wish to answer.

A. Yes.

Q. That's correct? A. Yes.

Q. Nevertheless, you wouldn't discuss the case with me at all. A. That's right.

Mr. Olson: Could we have an adjournment, your Honor?

The Court: Well, the Court will recess for ten minutes.

(Short recess).

(All parties present as before, and the trial was [196] resumed.)

Mr. Olson: I have no further questions.

Q. Miss DesCorreau, when Mr. Chamales came to your room at the Keystone Apartments in Seattle the first night and told you these matters that you've testified to, prostitution and his occupation and so forth, did he tell you why he was stating those things to you?

A. Yes, he said that I was a nice kid and he wouldn't want anything like that to happen to me.

Mr. Freeman: That's all.

Mr. Olson: That's all.

(Whereupon, there being no further questions the witness was excused.)

(Testimony of Betty DesCorreau.)

Mr. Freeman: That's all; the government rests its case, if your Honor please.

Mr. Olson: Your Honor, I'd like to address a motion to the court.

The Court: All right, the jury will step out a moment.

(Whereupon, the following proceedings were had without the presence of the jury.)

Mr. Olson: Comes now the defendant, the United States having rested, and in the absence of the jury and in the presence of the Court moves for an order [197] of non suit and dismissal as to each of the counts one and two of the amended information, on the ground that the United States Government has failed to introduce testimony from which the jury could find that the defendant Thomas T. Chamales had committed either of the offenses charged in the amended information as to either count. Now, your Honor please, the testimony as to count one, I'm not going to review it at length; it's necessary of course——

The Court: I have too clearly in mind what it is, I think. Your memory may be better than mine, but I've been following it pretty closely and taking notes, so you can assume I'm fairly familiar with it.

Mr. Olson: I didn't intend to review the testimony, your Honor. The statute requires and the cases all hold that in order to be guilty of the offense there has to be two things; there has to be both a transportation of Elaine Elliott in this case in interstate commerce, and the transportation has

(Testimony of Betty DesCorreau.)

to be with the intent of prostitution, debauchery, or other immoral purposes. Now, it is our position, your Honor, that as to count one there is no testimony whatever that the transportation was had with that intent. The testimony of Mrs. Elliott—I would like to make this statement briefly——

The Court: Yes, all right.

Mr. Olson:——is limited entirely that the only purpose [198] of the trip was to come out to work in the hotel.

The Court: It's his intent that counts, not hers. She thought she was coming out to work; he told her he was going to give her a job, but he didn't, but he used her for immoral purposes, so that certainly would be sufficient for the trier of the facts to find that was his purpose.

Mr. Olson: It has to be his main purpose.

The Court: The trier of the facts could find that was his only purpose. He put her in a room and used her for the immoral purpose, and didn't give her the job, so certainly I think it could be drawn that was his only purpose. Go ahead.

Mr. Olson: Your Honor, that's our position on count one. Obviously your Honor feels that the jury would have the right to infer from what took place that was his intent. It is our position that in a criminal case where the government is required to prove beyond a reasonable doubt that he did have that intent, the evidence is not sufficient.

The Court: At this stage I'm only concerned with whether there is substantial evidence or evi-

(Testimony of Betty DesCorreau.)

dence from which there could be a reasonable inference. The jury has to be convinced beyond a reasonable doubt.

Mr. Olson: As to the second count, the testimony [199] it seems to me goes beyond any question that the transportation, whatever may have been Miss Elliott's intention when she got here, there is no testimony from Elaine Elliott or anyone else that at the time that they had the phone call and the time that Tom sent the money, that he intended—what the purpose was, to get her out here. She said he asked her if she would be willing to work and how long she was going to stay. That was the substance of her testimony as to what the conversation was on the phone relative to her coming out here, outside of the previous discussions that she loved him and wanted to come out. That leaves only, your Honor, to tie it in, this testimony of this last witness Miss DesCorreau, and that it seems to me, where they are testifying to an admission with absolutely no independent proof of the transportation being for immoral purposes—in other words, if there's no other testimony at all, as I understand the rule, you cannot introduce and support a conviction on a sole statement or alleged admission of the defendant that he was getting her out for that purpose.

The Court: As far as the second count is concerned, the matter of intent is something that is peculiarly and usually buried in the mind of the one who is charged with having it, the accused. The

(Testimony of Betty DesCorreau.)

intent is inside of the accused's mind, something that isn't capable of direct [200] proof or demonstration, and therefore in most cases it must be gathered from the declarations and the acts and conduct of the accused, and that applies—of course, while the test is the intent at the time the transportation was furnished and effected, the intent may be shown by subsequent conduct as well as prior conduct, so that what he did and what he told her he intended to do after he got her out here may be considered properly by the trier of the facts in arriving at the intent. The motions will be denied. The motions will be regarded as a motion for judgment of acquittal of the defendant as to each count, and exception will be allowed to the defendant. Are you ready to proceed, Mr. Olson?

Mr. Olson: Your Honor, would it be possible to have about five minutes?

The Court: All right, I'll recess for five minutes.

(Short recess).

(All parties present as before and the trial was resumed.)

(Whereupon, the following proceedings were had within the presence of the jury.)

Defendant's Opening Statement

Mr. Olson: Your Honor please, counsel, and members of the jury. The testimony of the defendant in this case will show that Mr. Chamales' parents, Tom [201] Chamales, Sr., purchased and

(Testimony of Betty DesCorreau.)

operated, not the building, but the hotel business known as the Commercial Hotel in Yakima; that Mr. Tom Chamales, Jr., their son, the defendant in this case, came to assist in the operation of the hotel; Mr. Chamales being an elderly man approximately eighty years of age, the son became active in the management of the hotel. That the parents were here part of the time actively engaged in managing the hotel, and part of the time they were back in Elgin, Illinois, which is near Chicago.

That pursuant to a phone call from his father, Tom Junior made a trip back to Chicago in March of 1949, a business trip, and while he was there and while having lunch with Mr. Marty McDonald of the Cascade Lumber Company, and a friend of Tom's, Mr. Dick Sullivan, Mr. McDonald brought up the identity of Elaine Elliott, and arranged, agreed to arrange a meeting between Miss Elliott and Mr. Chamales. That Mr. McDonald called Mrs. Elliott and did arrange for Tom to call. Tom did call, pursuant to the call, they had a date. That Tom went out with her I think four times in Chicago. One of those times she was taken to dinner at his friend Dick Sullivan's place, at his home where his family was, and that he also took her to his cousin, Peter Chamales' place, Peter Chamales being an attorney in Chicago, and also took [202] her to his sister and brother-in-law's place.

That during these four meetings that Miss—Mrs. Elliott told Mr. Chamales not that she was married or separated, but that she was divorced from her

(Testimony of Betty DesCorreau.)

husband, and that her husband in the divorce proceedings—that she had a child, but that her husband had gotten the child, and in the course of the discussion she had mentioned she evidenced an affection for Mr. Chamales and also that she had stated to him that she would like to come out to Yakima, that she had a lot of associations in Chicago that she wanted to get away from. She stated to him that she had made trips with various men, some of them married, and that she wanted to get away from that environment; that she had been a member of this Pat Stevens Charm School, or I don't remember the exact name, but you've heard it mentioned, that she had considerable experience in handling other people, and that she could be a great deal of assistance to him out in the operating of the hotel in Yakima.

That pursuant to these conversations that it was agreed that he would take her out here, explaining to her, however, that he had no immediate opening for her and it would take some little time to rearrange the affairs. Mr. Chamales will not deny that sexual relations did occur between himself and Mrs. Elliott. The testimony [203] will show that shortly after their arrival at Yakima and before any opportunity afforded itself to give her the employment in the hotel, that they began to quarrel very bitterly, as the result of which Mr. Chamales decided that the only thing for her to do was to go back to Chicago, and that he told her that; that no arrangement between them could ever work out, and that she should return to Chicago.

(Testimony of Betty DesCorreau.)

That pursuant to that he did provide her with transportation, good transportation, into Chicago, and that while she was here he provided her expenses, gave her money, and took care of her. That he paid all of her expenses back to Chicago, but before she went he made it plain to her that no arrangement between them could ever work out satisfactorily, and that she should go back there and entirely forget him and just remember that it was all over. That almost immediately upon her return she then set upon a very exhaustive and persistent pursuit of Mr. Chamales by letters and by phone calls to try to get him to come out here—to try to get him to have her come out here again; that Tom accepted some of the calls, and on each occasion told her no, that it hadn't worked out, that it wouldn't work out, and that he was all through, and for her not to come out here. That nevertheless these calls persisted, that there was many, many calls that came [204] in, usually collect, and that he would simply refuse them. When the call would come in he would say "Tell her I'm out of town; tell her I'm gone; I'm not available" and that he would turn down the calls, on some occasions there would be ten or twelve times a day that call would come in, and finally he would accept the call and again tell her to quit calling him, that there was nothing out here for her to come out for.

That on one occasion she contacted the Northwest Airlines and had them contact the hotel, seeking to have *the* okay the charge to Mr. Chamales of trans-

(Testimony of Betty DesCorreau.)

portation to come out here. That that was refused. That the phone calls continued, and finally it became such a matter around the hotel, Mr. and Mrs. Chamales Sr. were present at the hotel, and the testimony will show that the letter which is in evidence from Mrs. Elliott came into the possession of Tom Chamales' mother, Mrs. Chamales, Sr., and quite a disturbance resulted from it, and as a result Mr. Chamales, the defendant in this case, was faced with a situation where he had to do something to stop this situation.

That he finally agreed then to send her the money to come out here for the sole purpose, our testimony will be, to give her to understand, as he was unable to do it over the telephone or any other manner, personally that [205] they were all through, that as far as he was concerned there was no intention on his part of any sexual relationship with her on the second trip, that he had no thoughts of that in mind, that his sole purpose in having her come out here was to emphatically impress upon her that she was to live her life, and that any relationship between them was over with. Again our testimony will not deny that there was sexual relationship between them on the second trip. We will not go into the details of that, other than to show that it was a matter of whether she was in love with him to the extent that she said she was, but at any rate the sexual relations were at her instigation and not Mr. Chamales'.

Our testimony will be that Tom, the defendant,

(Testimony of Betty DesCorreau.)

was very emphatic that nothing could work out between them, and that she was to leave him alone, pursuant to which she said that she had some friend who was a married man and had his family, and I'm not sure whether it was Denver or Salt Lake, I think it was Denver, that she could go down with him, he'd take care of her, if he didn't treat her right that's where she was going, and he told her if she wanted to go there that was her business, but he was not going to transport her there; if she wanted to go down to Denver with that man she should get her money from him and not from Mr. Chamales. That they quarreled over that, and [206] that she was continually trying to talk him into keeping her here.

That Tom at all times told her "I'll pay your way back to Chicago, and that's what you should do, that's where you should go, that's where your family is, and forget any relationship between us"; that she refused that, stated she wouldn't go back to Chicago, that she was going to go to either Denver or Salt Lake, Denver, I think. That he said "I will not provide you with funds to go there; I'm going to leave and go back to Yakima," this situation taking place over in Seattle, I believe at the Wilhard Hotel. She says "You mean you're going to walk out and leave me here?" and he says "Yes," that his efforts to get rid of her reached that point, he says "Yes; I'm going back to Yakima; you know my number; you know where I am; if you change your mind and want to go back to Chicago, I will send

(Testimony of Betty DesCorrean.)

you the funds or provide you with the funds for transportation there" and she then said "If you do that I'll get you; if I can't have you I'll see that no one else gets you."

Our testimony will show that the sole testimony upon which this defendant is sought to be convicted of this rather obnoxious charge is that of these two prejudiced witnesses, both of whom are mad at Mr. Chamales. Our testimony will show Mr. Chamales' life somewhat, that [207] he has never at any time had any connection with any house of prostitution, that he is not a pimp, that he never said he was, that this purported conversation that Miss DesCorrean testified to is a matter that she has made up for some reason, that he never told her any of those things. His testimony will show that he never at any time suggested to Miss Elliott that she go in or enter a house of prostitution. That his whole family life and everything has been that of—his business life has been that in connection with the operation of a hotel; that the Commercial Hotel in Yakima is the first class hotel there.

Our testimony will show what schooling he had, briefly, that he entered the armed forces and was discharged as a Captain, that he did have some readjustment period following the war, that he married, and that chiefly because of his combat neurosis that he had as the result of the war, that that first marriage did not work out, and that he did subsequently get a divorce; that since that time he has married, he's now married to his wife Connie,

(Testimony of Betty DesCorreau.)

the young lady you see sitting by him in court; that they have a child, and we believe that when our testimony has been submitted, members of the jury, that you will be firmly convinced, if you are not already so, that there was never at any time any intention on Mr. [208] Chamales' part to transport this woman Elaine Elliott in interstate commerce or otherwise for the purpose charged by the government in the amended information.

We'll call Clay Carroll.

CLAY CARROLL

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Olson:

Q. State your name, please?

A. Clay Carroll.

Q. And where do you reside, Mr. Carroll?

A. Yakima, Washington.

Q. You came here at my request?

A. Yes, sir.

Q. Now, Mr. Carroll, how long have you lived in Yakima? A. Since 1917.

Q. Since 1917? A. Yes.

Q. Are you employed there? A. Yes, sir.

Q. In what capacity?

A. Assistant manager, Commercial Hotel.

Q. And how long have you been connected with

(Testimony of Clay Carroll.)

the management of the Commercial Hotel in Yakima?

A. I've been employed there for twenty years; connected with the management, assistant management, the last five years. [209]

Q. You've been actually employed in the hotel itself, though, for twenty years? A. Yes, sir.

Q. During that time has there been different management of the hotel?

A. Quite a number of different managements.

Q. How large a hotel is that?

A. 146 sleeping rooms.

Q. And a dining room, is there?

A. A dining room, banquet room, seating capacity 350; the dining room, the coffee shop, seats about 120.

Q. Is that hotel—do you know the reputation of that hotel or the type of hotel it is in Yakima?

A. It's Yakima's leading commercial hotel, a very good name.

Q. Now, do you recall the operation of the hotel for a time under the management of the Chamales family? A. Yes, sir.

Q. Now, while you've been there has the ownership of the building and the ownership of the hotel operation been separate? A. Yes, sir.

Q. The building is owned by someone else?

A. A private party, yes, sir.

Q. Now, do you recall, Mr. Carroll, a Miss Elaine or Mrs. Elaine Elliott? [210] A. Yes, sir.

(Testimony of Clay Carroll.)

Q. And do you recall that she came to Yakima at the hotel sometime in the early part of 1949?

A. Yes, sir.

Q. And do you recall her leaving?

A. Yes, sir.

Q. Now, I'll ask you if following that do you recall a phone conversation or receiving a phone call from anyone with reference to the transportation of Elaine Elliott by Northwest Airlines to Yakima?

A. Yes, sir.

Q. Would you state what occurred in regard thereto?

Mr. Freeman: Just a moment, your Honor. No date has been stated as to the date of the conversation; I think it should be stated with some degree of particularity.

The Court: Can you fix the date, Mr. Olson?

Q. (By Mr. Olson): Well, do you or do you not recall when Mrs. Elliott was out to Yakima the second time?

A. Not the date, sir.

Q. Well, do you recall, though, her being out in Yakima a second time?

A. Yes, sir.

Q. Now, without remembering the specific date that I'm asking you about the call with reference to the Northwest [211] Airlines, can you fix it as being between or before or after or can you give us anything with reference to those two occasions?

A. Between the first and second trip?

Q. Yes, as to whether it was between them or wasn't.

A. I couldn't say. I'd say it was before the

(Testimony of Clay Carroll.)

second trip, although I couldn't—

Q. You could say it was before the second trip, you say?

A. I believe, but I couldn't swear to that.

Q. Well, is that your best recollection?

A. That's my best recollection.

Q. That was prior to the second trip?

A. Yes.

Q. Could you give any indication as to how long before? A. No, sir.

Q. Well, just state what occurred, Mr. Carroll.

Mr. Freeman: Are you asking for the conversation?

Mr. Olson: Yes.

Mr. Freeman: I think I should object, your Honor. He said he couldn't recollect the date. I think it's too ambiguous for testimony, if your Honor please. He says he isn't sure whether it was before the first trip, or between the two trips.

The Court: Will counsel step up to the bench, please? [212]

(Whereupon, the following proceedings were had at the bar, out of the hearing of the jury.)

The Court: Do you propose to prove by this witness that someone came from the Northwest Airlines office in Yakima and asked for transportation for Elaine Elliott?

Mr. Olson: No, I propose to show by this witness that he received a phone call from the Chicago office. When I cross-examined the witness I was

(Testimony of Clay Carroll.)

under the impression it was the Yakima office. When the witness came over here I talked to him, and what he would state was that the Chicago office called the hotel and said Miss Elaine Elliott was there and requesting this transportation, and to show that it was refused.

The Court: Well, I think you've shown probably the time as accurately as you can.

Mr. Olson: As accurately as I can.

The Court: I'll admit it, then.

(Whereupon, the following proceedings were had within the presence and hearing of the jury.)

Q. (By Mr. Olson): Would you just relate, Mr. Carroll, what occurred with reference to the Northwest Airlines?

A. Well, the date I don't remember. There was one day the operator had a call, a long distance call from Chicago stating that Elaine Elliott was calling collect for Mr. Tom Chamales, Jr. We informed her that he wasn't in, and [213] didn't know where he could be reached, and an hour or so later the call come in again, the same call, same party, and the same information was relayed back to the operator, that Mr. Chamales was not in.

Q. Those were collect calls, were they?

A. In collect, and then there was some time later, a little later in the day, that I had a call from the Northwest Airlines, stating this is an employee of the Northwest Airlines, and if we would guarantee—

(Testimony of Clay Carroll.)

Q. From the Northwest Airlines, where?

A. In Chicago; if we would okay her transportation from Chicago to Yakima, if I'd give the Northwest Airlines Company a check here or pay them, they would put her on a plane and send her to Yakima, and of course I had no way to authorize that, and I told them absolutely no, we could not do anything like that, we would not authorize a ticket for her transportation out here.

Q. Now, Mr. Carroll, in your employment there at the hotel did you work at the desk part of the time? A. Yes, sir.

Q. And where is the switchboard with reference to the desk?

A. Well, it's to the right of the desk, approximately about six feet from me.

Q. Now, what can you tell us, or just what was the situation with reference to collect phone calls coming in and being [214] refused, from Elaine Elliott to the hotel for Mr. Chamales?

A. Well, all the calls coming in from Elaine Elliott to Mr. Chamales in collect, if he was in the house he was notified on a separate line that there was an in collect call from the party, and did he wish to speak on it. There was times that he accepted some calls. The majority of the times Mr. Chamales informed us that he was out, we didn't know where to reach him, and we would inform the operator or the party at the other end that Mr. Chamales was not in and could not be reached by telephone.

(Testimony of Clay Carroll.)

Q. When he would say to "Tell them I'm out, or can't be reached," was he advised that it was a collect call from Elaine Elliott? A. Yes, sir.

Q. And can you tell the jury anything about the frequency that that would happen?

Mr. Freeman: What period are you speaking of?

Mr. Olson: Following the first trip and prior to the second trip.

A. There was times we would get a number of calls, repeatedly all during the day, a number of calls, in collect calls, and that went on for some time. Of course, there would be periods, and then there would be times that we'd have quite a number of in collect calls.

Q. Do you know, Mr. Carroll, whether or not any call came in [215] from Elaine Elliott where she gave the name of someone else, such as Mrs. George Crowley?

A. Well, I heard of a call, but I——

Q. But you didn't personally——

A. No, sir, I was not in the hotel at the time.

The Court: I think the jury should disregard that unless he knows of his own knowledge.

Q. Mr. Carroll, does the Chamales family presently have anything to do whatever with the Commercial Hotel? A. No, sir.

Q. Are you in any way at all connected with the Chamales family? A. No, sir.

Q. Do you know when they sold out their interest in the hotel operation?

(Testimony of Clay Carroll.)

A. I believe the exact date was July 7, when it changed hands.

Q. Of what year? A. Of 1950.

Q. So anyhow you think it was July 7, 1950?

A. Yes.

Q. And since that time you've been employed by someone else? A. Yes, sir.

Q. At the same hotel? A. Yes, sir.

Mr. Olson: You may examine. [216]

Mr. Freeman: I have no questions.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Olson: We'll call Mr. Chamales.

THOMAS T. CHAMALES, JR.

the defendant, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct Examination

By Mr. Olson:

Q. Will you state your name, please?

A. Tom Chamales, Jr.

Q. When were you born, Tom?

A. August 8, 1924.

Q. How old are you now?

A. Twenty-six.

Q. And you were born where?

A. Chicago.

Q. Are you married? A. Yes.

(Testimony of Thomas T. Chamales.)

Q. This is your wife sitting with you here?

A. Over there.

Q. Where did you meet her?

A. In Yakima, Washington.

Q. Now, do you have any children?

A. Connie and I have one child, yes, and I have a child by a previous marriage. [217]

Q. You have a child by a previous marriage?

A. Yes.

Q. What is the age of your present child?

A. Five months.

Q. You say five months? A. Yes,

Q. And what is the age of the child by the first marriage? A. Three and a half years.

Q. Now, you're now living where, Tom?

A. Elgin, Illinois.

Q. And whereabouts? A. Fox Hotel.

Q. And who operates the Fox Hotel?

A. It's a family operation.

Q. Your family operation? A. Yes, sir.

Q. Your father and mother are there, are they?

A. Yes, sir.

Q. How old is your father?

A. Approximately 79.

Q. Now, Tom where did you have your schooling? A. From the beginning.

Q. Yes.

A. I attended a Catholic grammar school, St. Francis.

Q. Whereabouts? [218]

(Testimony of Thomas T. Chamales.)

A. In Wilmet, Illinois, and an Episcopal military school, St. John's Military in Delafield, Wisconsin.

Q. Do you know what period of time you attended that school?

A. I think I got out of there the year 1942.

Q. Now, at that school, did you receive any awards of any kind at that school?

A. Yes, sir, I did.

Q. What?

A. Well, I received numerous athletic awards, and I received one of the school's highest awards for combined proficiency in athletics and scholarship and military.

Q. Well, was that schooling a military education of some kind?

A. Yes, sir, it's connected with the small government program that they had before the last war.

Q. Now, what year did you graduate from St. John's Military Academy? A. 1942.

Q. And what did you do then?

A. I applied at that time—I was only seventeen, so I had to wait until I was eighteen to go under a program, because I had a military background, I was allowed to enter the army as a private and inside of thirty days if I qualified physically, to go to O.C.S.

Q. Now, what does that mean?

A. That's the Officer Candidate School, the infantry school [219] at Fort Benning, Georgia. I applied when I got out, and they told me that at

(Testimony of Thomas T. Chamales.)

time I was too young, and so I went to college at the University of Iowa for about two months, and after I was there for about two and a half months, I decided to make another request, which I did, and I was accepted and taken in the army as a private.

Q. You then volunteered and entered the army as a private? A. That's right, sir.

Q. Was that still in 1942?

A. Yes, sir, I believe so.

Q. And then what did you do?

A. Well, I went in and I served this approximately thirty days, and passed the tests, and I went to the O.C.S. at Fort Benning, Georgia.

Q. That's the Officer's Training School?

A. That's right, sir.

Q. Well, as a result of that did you receive a commission? A. Yes, sir, I did.

Q. Of what? A. Second Lieutenant.

Q. Then what happened after you received your commission as a second lieutenant?

A. After that I went to Camp Wheeler, in Macon, Georgia, as an instructor. It was a place where the new recruits came in, and I instructed there for about three and a half [220] to four months.

Q. Then what did you do?

A. Then I was shipped to North Africa.

Q. Did you request that, or did that just come forward? A. I requested that.

Q. You requested——

A. ——overseas service.

Q. And pursuant to that you were shipped to

(Testimony of Thomas T. Chamales.)

North Africa? A. That's right.

Q. Now, in what particular branch of service were you there?

A. I was in the infantry there. I only spent a very short length of time there, and from there I went out to India.

Q. What part of India?

A. The central province in India, eventually. The first place was in Bombay, and thence to Calcutta. At Calcutta I——

Q. I take it this was in the Japanese phase of the war that you were engaged in?

A. That's right.

Q. What happened then?

A. Well, I volunteered for an organization which became known during the war as Merrill's Marauders.

Q. And what was their particular function, and what did you do in connection with Merrill's Marauders?

A. Well, it was a new type of warfare; it had to do with what [221] this British General Wingate called a long range penetration, three large separated groups of men who would go down behind lines in the jungle and engage in road blocks and the cutting of communication lines, and then would disperse into small groups and run to the hills. That's the type of operation.

Q. Were you dropped in by parachute behind the lines? A. Not then, sir, no.

Q. Now, in that type of service then with Mer-

(Testimony of Thomas T. Chamales.)

rill's Marauders were you engaged in actual combat?

A. Yes, almost daily for about six months?

Q. Can you tell the jury anything about the type of combat that it was?

A. Well, just what I mentioned previous to that, that these were all American troops, and I stayed with them until a place called Mishina in Burma, and at Mishina I was wounded, and I was sick, and——

Q. Is that while you were still with Merrill's Marauders? A. Yes, sir.

Q. What type of wound did you receive?

A. I received shrapnel wounds in my feet and my head.

Q. Did you have any concussion of any kind?

A. Yes, I had quite a severe concussion.

Q. How did you receive the injury?

A. It was from a Japanese thrown grenade. It landed next to [222] me.

Q. Well, can you kind of explain to the jury how the concussion resulted from that grenade?

A. Well, the actual part was that when that thing explodes it explodes up, it leaves a little cone. The only reason that I wasn't hurt too badly, the concussion was so great but that I wasn't hurt too severely by the shrapnel was that the grenade was so close to me that I was almost underneath the cone dispersion.

Q. Had you in the service up to that time been subjected to hand grenades being thrown at you prior to that time? A. Yes, sir.

(Testimony of Thomas T. Chamales.)

Q. And what had it been necessary for you to do from time to time to escape injuries?

A. Throw them back.

Q. What was the next service you had, if any, in connection with your armed service?

A. Well, I went to the hospital, because my weight was down pretty much.

Q. What was your weight at that time?

A. When I came out of Burma I believe the hospital record shows 98 pounds.

Q. How much do you weigh now? A. 225.

Q. You say your weight went down to 98? [223]

A. Yes.

Q. What other service did you have then in the Army?

A. Well, after I was hospitalized I got feeling good again, I was given a leave, and I volunteered to join the O.S.S., which was organizing the guerrilla forces in Burma.

Q. I didn't hear what you said about given a leave.

A. I was given a leave, a little rest leave, when I got out of the hospital.

Q. What happened to Merrill's Marauders?

A. Well, they were disbanded, and everybody, just about, was sent home.

Q. Did you have an opportunity to go home?

A. Yes, sir.

Q. What did you do?

A. Volunteered for this other organization.

Q. And that other organization was what, again?

(Testimony of Thomas T. Chamales.)

A. Well, the O.S.S. was at that time going to organize a guerrilla force in Burma.

Q. Now, where did you serve with the O.S.S.? First, what is the O.S.S.?

A. Well, in the last war it was the thing that was set up by the—the organization set up by the president to centralize the intelligence of the Navy and the Army as much as possible.

Q. What does O.S.S. stand for? [224]

A. Office of Strategic Services.

Q. All right, now, what was the nature of your service in that regard, as to whether it was combat service or not?

A. My first operation with them was that I jumped into a little hill town.

Q. What do you mean, jumped?

A. Parachuted into a little hill town called Lashio—I mean Sinloon Caban.

Q. Where was that?

A. Just a little bit west of Bamal.

Q. In the Burma theater?

A. Yes, a little north of Lashio.

Q. All right.

A. And I took over a small guerrilla force and built it up to about 900 men, the Chin guerrillas, which were Tibetans. They were hill people and they were excellent fighting men, they served with distinction. The regulars that had been recruited by the British Army in previous years had served with tremendous distinction for the British. They were somewhat of a warlike people, and the attitude of Burmese people as a rule was pro-Japanese, but

(Testimony of Thomas T. Chamales.)

the attitude of the Chins was against the Japanese, and that's why it was essential——

The Court: Will counsel step up to the bench a minute, please? [225]

(Whereupon, the following proceedings were had at the bar, out of the hearing of the jury:)

The Court: I think it's all right for you to show the military background and the war service of this man, but we can't show it in such minute detail here; he's going into the history of this war; it will be days; if he keeps up at this rate, all this exposition of what was happening in the Burma theater. I think you should do this very rapidly; if you don't I'll have to cut you off entirely, because I can't let you go into minute detail like that.

Mr. Olson: Your Honor, my purpose was showing the long time that this man was subjected to actual combat.

The Court: You can ask him how long he was in combat and what wounds he received.

Mr. Olson: That's the sole purpose.

The Court: Yes, but the way he's going now it will be days before he gets off of here. You could write a book on that.

Mr. Olson: We are quite close to being through now, Judge.

The Court: I don't think so, from the way he's going. Proceed.

(Whereupon, the following proceedings were had in the presence and hearing of the [226] jury:)

(Testimony of Thomas T. Chamales.)

Q. (By Mr. Olson): Mr. Chamales, was your rank still that of a second lieutenant?

A. No, sir, I was a captain.

Q. You had been promoted to the rank of captain?
A. Yes, sir.

Q. Now, how long were you in the Burma theater with the O.S.S.? A. Over two years.

Q. Over two years. Now, during that time was your service there connected with—I mean in connection with your service, was it combat service?

A. Yes, sir.

Q. And will you tell the jury briefly how much of your time that you were actually in combat?

A. I'd say I spent about fifteen months solid.

Q. And can you tell the jury anything about how long you would be in continuous combat without a rest?
A. As long as eight months.

Q. Did you receive any other injuries besides the concussion and the shrapnel in your head and face and feet?
A. No, sir.

Q. Now, did you contract any disease in Burma?

A. Yes, sir, I had malaria and amoebic dysentery.

Q. Now, when did you get out of the Army?

A. December—the war was over in what year, '45?

Q. I think that's correct. [227]

A. December of 1945.

Q. That was the December following the end of the war with Japan?
A. That's right, sir.

(Testimony of Thomas T. Chamales.)

Q. Now, did you receive any medals in connection with your Army service?

A. Yes, sir, just unit citations. They didn't give medals, hardly, in the service. If they did give you one they had "secret" stamped over it so much you couldn't show it to anybody.

Q. Well now, following your discharge from the Army, Tom, what was your health?

A. It was—my weight was good, my weight was pretty good, but I suffered from terrific headaches, violent headaches, and I attempted immediately—in fact, before I was discharged I was under civilian care.

Q. Well, now, how often would you get these headaches?

A. Well, at first they were about two months apart, and the time of them seemed to decrease until they were about six weeks.

Q. Connected with that, Tom, was there any emotional or nerve tension?

A. Yes, sir, I was very nervous at times. I had periodic—for no apparent reason, with nothing apparent on my mind, I would have a tendency to be quite nervous and to have [228] my hands sweat and to have a tight feeling in my stomach about every six or seven weeks. It would stay with me anywhere from two or three days to a week.

Q. Now, did you secure medical attention as the result of that?

A. Yes, sir, I did.

Q. And who did you go to first, and when, approximately?

(Testimony of Thomas T. Chamales.)

A. In 1945, prior to my discharge, I began to see a Doctor Scaman in Evanston, Illinois.

Q. Can you tell us briefly how often he treated you?

A. Well, he treated me, to the best of my recollection, it was some time ago, about three months; about three months.

Q. What type of doctor is Doctor Scaman?

A. He's a general practitioner.

Q. What other doctors did you see, if any?

Mr. Freeman: Your Honor, I'm going to object to that. It's apparent from the defendant he's going to contend he's not responsible for his actions.

The Court: I don't see the purpose of it, Mr. Olson. I'll ask the jury to step out just a moment; perhaps we can shorten this a little.

(Whereupon, the following proceedings were had without the presence of the jury:)

The Court: What is the purpose of this line of testimony as to his being treated by physicians?

Mr. Olson: Well, your Honor, it's to show emotional instability during his readjustment period following the war.

The Court: What's that got to do with the issues in this case? You're not putting in an insanity defense, are you?

Mr. Olson: No, I'm not claiming that the defendant was insane.

The Court: I think then it's immaterial. I've given you wide latitude in background testimony

(Testimony of Thomas T. Chamales.)

here. His war record has nothing to do with the issues in the case except to let the jury know who he is and what he's done and so on; I think that's proper bearing on the likelihood of his committing the offense, but I don't see where it would be material to show that he was ill or what happened to him so far as that goes, unless you claim mental irresponsibility, the defense of insanity.

Mr. Olson: Well, mental irresponsibility and emotional instability can be fairly close. As far as the transportation, we've got to bear in mind this count one, the testimony which has been introduced, is absolutely nothing more than an escapade between Tom Chamales and Elaine Elliott.

The Court: That's four years after the war ended.

Mr. Olson: That's right. [230]

The Court: And while there are all gradations of emotional and mental instability, unfortunately the law doesn't recognize anything as a defense than that of insanity or mental irresponsibility which renders the accused incapable of distinguishing between right and wrong. Perhaps our system is too crude and doesn't take into account the various gradations, but it doesn't. It's my view unless you have an insanity defense it's not material. Of course, this first transportation was four years after he got out of the Army.

Mr. Olson: That's true, your Honor, but we can show this emotional instability right up to the present time, and show the defendant is still under

(Testimony of Thomas T. Chamales.)

treatment from a doctor who is in charge of the state hospital in Elgin, Illinois.

The Court: Suppose you showed he was emotionally instable, or what is known as a psychopathic personality, I'd have to instruct the jury that was no defense, and they would have to disregard it, unless it rendered him incapable of distinguishing between right and wrong.

Mr. Olson: It seems to me it is material and very much so as to whether or not he had the intent that's been charged by the government in connection with this transportation.

The Court: You're not claiming he was rendered [231] incapable of intent, are you, by his mental condition?

Mr. Olson: It's possible, your Honor.

The Court: I don't think so. I don't think it's material, and I'll so rule. Bring in the jury.

(Whereupon, the following proceedings were had within the presence of the jury:)

The Court: All right, proceed.

Q. (By Mr. Olson): Mr. Chamales, did your family following the war purchase the operating lease on the Commercial Hotel in Yakima?

A. Yes, sir.

Q. And following that did you come to Yakima?

A. Yes, sir.

Q. Do you know approximately when you came to Yakima?

A. I think it must have been January, 1947.

(Testimony of Thomas T. Chamales.)

Q. Now, did you assist your father in the operation and management of the Commercial Hotel in Yakima? A. Yes, sir, I did.

Q. Then getting down to the year 1949, did you in the early part of the year, do you recall where your father and mother were in 1949?

A. In Elgin, Illinois.

Q. Did you receive a call from your father pursuant to which you made a trip to Chicago?

A. Yes, sir. [232]

Q. And can you tell the jury approximately when you went to Chicago, referring to the month of March, 1949?

A. The first part of March in 1949.

Q. Now, when you got to Chicago do you recall having a luncheon with some friends, particularly one Marty McDonald? A. Yes, sir, I do.

Q. Pursuant to that, or during that conversation, did the name of a young lady come up?

A. Yes, sir, it did.

Q. And whose name was that?

A. Elaine Elliott.

Q. And who brought the name up?

A. Martin McDonald.

Q. I assume I'm not permitted to go into that conversation. Following the conference, this luncheon engagement, then, did you call Elaine Elliott on the phone? A. Yes, sir.

Q. Briefly, what was the substance of the conversation?

(Testimony of Thomas T. Chamales.)

A. We made arrangement to meet at the Chicago Athletic Club.

Q. Did she say anything that indicated that she was expecting a call from you, and if so, what did she say?

A. Yes, she said that she was expecting to hear from me, and that she'd be very glad to make a date with me, that she [233] had dated Marty, and Marty suggested that——

Mr. Freeman: Just a moment; I submit that be stricken as not responsive.

The Court: Well, I'll let it stand. Go ahead, ask another question.

Q. Then pursuant to arrangements did you meet her then? A. Yes, sir, I did.

Q. Whereabouts?

A. In the waiting room of the Chicago Athletic Club.

Q. Now, did you take her out to dinner that day?

A. Yes, sir, I believe that on that day, the first date, that she told me that she had an engagement with another gentleman that evening, but that she would break it and stay out to dinner with me.

Q. How many times did you see her in Chicago prior to coming to Yakima?

A. Four or five times, I believe.

Q. She testified that you were out with her every night; is that true?

A. I don't believe so, no sir.

Q. Pardon? A. No, sir, it is not true.

(Testimony of Thomas T. Chamales.)

Q. You say four or five times. Can you tell the jury where you took her on those times?

A. It was usually in the ladies' cocktail bar of the Chicago [234] Athletic Club or to perhaps the dining room of the Drake Hotel, or to the nice—they were very nice places that I took her.

Q. Where else did you take her with reference to your friends and family?

A. I took her to the home of Mr. and Mrs. Richard Sullivan.

Q. Who is Mr. Richard Sullivan?

A. He's a broker, an investment banker in Chicago.

Q. Was his family there?

A. Yes, he has a family.

Q. Did you have dinner at his place?

A. Yes, sir, we did.

Q. And Miss Elliott? A. Yes.

Q. What did Mrs. Elliott tell you about her marital status?

A. She said that she was in the process of divorce.

Q. Now, where else did you take her with reference to your family and friends?

A. I took her to my brother-in-law's home, Mr. George Crowley, who's sitting behind you. I also took her to my cousin's home, who is an attorney in Chicago, and who has a family.

Q. Now, during that entire time, Mr. Chamales, did you have any sexual relations with Mrs. Elliott?

A. I did not. [235]

(Testimony of Thomas T. Chamales.)

Q. Did you attempt any? A. I did not, sir.

Q. Did a discussion come up about her making a trip out to Yakima? A. Yes, sir.

Q. And what did she say, if anything, about coming to Yakima?

A. Well, I was discussing my duties there at the Commercial Hotel. She suggested that she might be of some help. She did this in a joking manner. She said she might be some help to me out there, and she told me what experience she had had in personnel.

Q. What did she say?

A. Well, that she had worked in this charm school as an instructress, and she really knew how to handle people, and——

Q. What charm school?

A. Patricia Stevens Charm School.

Q. All right, go ahead.

A. She told me about this background of hers. A little while later on we began to discuss the possibilities of her coming to Yakima to work at the Commercial Hotel in the capacity of a hostess. She suggested to me on almost every occasion, and it was at her suggestion that we talked about it.

Q. Did she say anything about wanting to leave Chicago, and [236] if so, what did she say?

A. Yes, sir, she did. She said that she felt that she was mixed up with a bad crowd in Chicago, and she wanted to get out of Chicago. I learned later on the train that one of the main reasons, when she

(Testimony of Thomas T. Chamales.)

got on the train she told me that she was in very bad financial condition in the town.

Q. She told you that on the train?

A. Yes, sir.

Q. Well, did she say anything—that she was mixed up with a bad crowd; what did she say if anything else? Is that what she said?

A. She said that she had made several trips to New York with other men, older men, and that she was just tired of living that kind of a life.

Q. Well, now, Tom, when you got on the train, or before you went to the train, where did you meet her?

A. At the Glass Hat, at the Congress Hotel.

Q. And were you already there before she came, or did you go there with her, or how?

A. I was to meet her, and she and her mother were sitting in the Glass Hat and I came in. I sat with them for a while. I had to go to meet a gentleman that was coming into Yakima—from Yakima to go to Washington, D. C., with my father on some business. I went and met him at the [237] limosine at the Stevens Hotel, and I came back with him to the Glass Hat at the Congress and resumed the conversation with her mother and her.

Q. Well, in the conversation, was the conversation in front of her mother that you and Miss Elliott were going to Yakima?

A. Yes, sir.

Q. Now, you mentioned a trip to Washington. Did you make a trip to Washington while you were there?

A. I did not, sir.

(Testimony of Thomas T. Chamales.)

Q. Did you tell Miss Elliott that you had to make a trip to Washington? A. I did not, sir.

Q. Then when you got on the train, Mr. Chamales, where did you go first?

A. Went to our compartment.

Q. And you and Mrs. Elliott together?

A. That's right, sir.

Q. And you heard her testify that you went first to the lounge, I think she said?

A. That's incorrect, sir. We came and put our—Elaine had a hat box with her and some other articles, and we came and put our coats and our hats and checked the compartment in the train, and then we went to the club car, but we certainly wouldn't go to the club car—— [238]

Q. When you got in the compartment there did she protest or indicate surprise?

A. No; we had an understanding.

Q. What did she do?

A. She didn't say anything.

Q. All right; well, then, what did you do?

A. We went down to have a drink.

Q. And that's whereabouts, Tom?

A. On the train, in the cocktail bar on the train.

Q. How long were you there?

A. I would say an hour.

Q. Well, then, following that, Tom, did you come out to Yakima? A. Yes, sir.

Q. Now, at Yakima, when you arrived in Yakima was that in the middle of the night, was it, sometime? A. Pardon?

(Testimony of Thomas T. Chamales.)

Q. Was it the middle of the night sometime when you arrived in Yakima?

A. About one o'clock in the morning.

Q. Where did you go then?

A. To the Blue Room.

Q. The jury probably doesn't know what the Blue Room is.

A. That was the name the hotel employed, an expression of the manager's apartment, decorated in blue colors, so they [239] called it the Blue Room.

Q. The Blue Room designates the manager's living quarters at the hotel?

A. That's correct, sir.

Q. Now, how long was Miss Elliott in Yakima at that time?

A. About three weeks, two to three weeks.

Q. How did you get along after you got out to Yakima?

A. We got along pretty well for a little while.

Q. And then what happened? A. Pardon?

Q. Then what happened?

A. Well, I could see the handwriting on the door, more or less, that she—well, I had to have business men up to the apartment when I booked a banquet or made arrangements for a convention we usually did that in the apartment, and there was lots of times we would book those in the apartment, and offer the person who was booking it, as a matter of policy offer them a drink. Naturally, I couldn't—Elaine couldn't stay in the same room with me. I told her that I was going to have to move her to

(Testimony of Thomas T. Chamales.)

another room, to which she protested greatly. I explained the reason. After that Elaine and I began to argue an awful lot, and we argued an awful lot. I treated her very well; in fact, I had a dinner party for her about ten days after she was there in which—— [240]

Mr. Freeman: Just a moment; if your Honor please, that's not responsive.

The Court: Well, no, it's not. Ask another question.

Q. (By Mr. Olson): Mr. Chamales, did you subsequently then begin to quarrel with Elaine?

A. Yes, sir, very much so.

Q. And you never did actually employ her in the hotel? A. No, sir, I did not.

Q. And why not?

A. Well, we started to quarrel. I told her absolutely, and Elaine knew, that in order to fill the job I never try to let anybody go without a fair and decent notice, and I said that if she was going to fill this job, and if she wanted to stay, because after she had been there a few days she talked to herself about not wanting to stay there, she was thinking of Chicago and her friends, I guess, or maybe she was just a little bit homesick, I don't know what it was, but she talked about that, and I didn't want to make any move to fire any steady employee without definite knowledge that she was going to fill the post.

Q. Then what happened with reference to the quarreling and with reference to her staying there?

(Testimony of Thomas T. Chamales.)

A. Well, I told her that our relationship could just—wasn't [241] working out at all, and I told her I thought it would be the best thing for her to go back, and she sat on that a few days, and finally it was agreed upon.

The Court: This seems a good place to stop. We'll adjourn until tomorrow morning at 10 o'clock.

(Whereupon, at 4:30 o'clock p.m., the Court took a recess in this cause until Thursday, January 11, 1951, at 10 o'clock a.m.) [242]

January 11, 1951—10 o'Clock A.M.

(All parties present as before, and the trial was resumed.)

Direct Examination
(Continued)

By Mr. Olson:

Q. Mr. Chamales, we took up yesterday and finished I believe with the first trip that you and Elaine made to Yakima. Can you tell me the approximate date that you met Mrs. Elliott in Chicago? A. Approximately March 9 or 10.

Q. Now, that's when you met her for the first time? A. Yes.

Q. About March 9 or 10? A. Right.

Q. Of what year? A. '49.

Q. Then can you tell us approximately the date that it was that you took the train trip out to Yakima? A. About March 20.

Q. About March 20 of the same year?

(Testimony of Thomas T. Chamales.)

A. Yes.

Q. 1949? A. Yes.

Q. Now, after Mrs. Elliott returned to Chicago at the end of the first trip, as you related yesterday, what occurred [243] then with reference to hearing from her, if you did?

A. Mrs. Elliott wrote me several letters, and immediately after her return she called me on the phone. I think it was about a month after she was back she started a series of telephone calls to me. These phone calls, we had as high as I would say fifteen or eighteen calls in one day. I would refuse the calls oftentimes. I would tell the switchboard operator the clerk that I had gone to Spokane, to say I had gone to Spokane. These calls were collect from Mrs. Elliott.

Q. Well, now, Tom, did you accept some of the calls? A. I accepted some of them, yes, sir.

Q. And when you accepted the calls what did you say, if anything, to Mrs. Elliott?

A. Well, I told Miss Elliott what I had before, that it was impossible, that she couldn't come out here, that the whole thing was finished, and that it was all over, please not to call any more, it was getting to be a terrible nuisance around the hotel, and you can imagine three or four hours with one switchboard girl, in a fairly large hotel, twenty long distance calls coming in, or fifteen calls, and it was getting to be a terrible bother, and it was getting my parents, who were in Yakima, very upset with me.

(Testimony of Thomas T. Chamales.)

Q. Was your father and your mother at the hotel there at [244] that time?

A. Yes, sir. In fact, Mrs. Elliott one time used my sister's name,——

Q. What sister is that?

A. Mrs. George Crowley, in attempting to get a call through to me, and was connected with my father.

Q. And Mrs. Crowley lived where?

A. In Chicago.

Mr. Freeman: Just a moment; your Honor, I'll object to that unless he knows that. Were you so told, or do you know that by yourself?

A. I was so told by my father, so I know it.

The Court: Sustain the objection.

Q. Well, now, you say that you received letters from Mrs. Elliott? A. That's right, sir.

Q. Showing you defendant's Exhibit number 4, is that one of the letters that Mrs. Elliott wrote?

A. Yes, sir.

Q. With reference to the first trip and the second trip, was that written between those two trips?

A. Yes, sir.

Q. And did anyone get possession of this letter besides yourself? A. My mother. [245]

Q. Now, Mr. Chamales, there's witnesses that have testified that you did send Mrs. Elliott, through her roommate, Marge Mahoney, expense money to come out for a trip. Did you do that?

A. Yes, sir.

(Testimony of Thomas T. Chamales.)

Q. And what was the purpose of getting her out here?

A. Well, I had told her numerous times on the telephone that it would have to be all over, my mother and father were very, very upset about this tremendous persistency that Mrs. Elliott carried on; I mean the phone situation had gotten to be just terrible around the hotel, and mother and dad were on me all the time.

Q. What was your purpose, now, in getting her out?

A. Well, I told her on the phone that it would have to be all over. It just seemed that the more I told her that, the more she called, and I told her on the phone that she could come out, and that I was going to sit down and explain to her the situation that I was in. I wanted to do it to her personally. I thought I could explain to her that I was on the spot, and that if I didn't do it, I don't know what my position would be with my family if I didn't get the girl to stop.

Q. Well, now, when she came out—you did send the money and she did come out?

A. Yes, sir. [246]

Q. Now, what if anything then did you say to her, or what discussion if any did you have with her after she came out here with reference to your relationship with her?

A. I told her immediately after seeing her, I told her just what I told her on the phone——

Mr. Freeman: Your Honor, I'm going to object

(Testimony of Thomas T. Chamales.)

to that unless he makes the time a little more specific.

The Court: I think he should fix the date of the conversation.

Q. Do you recall the date of the conversation?

A. The exact date I do not know, sir.

Q. Well, with reference to her arrival?

A. It was the first night she was here.

Q. All right.

Mr. Freeman: On the second trip?

A. Yes, sir.

Q. Now, just relate the substance as near as you can, as to what your conversation with her was.

A. Well, I located Elaine later in the evening, and——

Q. Now, did you meet her plane?

A. No, sir, I did not. Elaine was to go to the Olympic Hotel, and I didn't—I went to the Olympic Hotel; she wasn't there.

Q. Now, the question is, Tom, what was the substance of your conversation with her that [247] night?

A. I told her of the situation again that I was in. It was quite difficult, because just as soon as I came into the room she threw her arms around me and told me how glad she was to see me, and she started to talk, I mean I didn't have a chance to say much for a couple of minutes, and then I told her, I said "You know why I brought you here," and I said "We've got to talk it out."

(Testimony of Thomas T. Chamales.)

Q. Now, did you at that time, Tom, tell her in substance, "Well, Elaine"—

The Court: I don't think you need to lead him. Can't you ask him what the conversation was, Mr. Olson? You're preparing to ask him "Did you say so and so?"

Mr. Olson: Your Honor, I had in mind a denial of a conversation that Elaine——

The Court: I don't think you need to put the words in his mouth. Ask him what he said, with reference to the substance if you wish.

Mr. Olson: I was under the impression that I must ask specifically——

The Court: Are you covering what she said he said?

Mr. Olson: Exactly, your Honor.

The Court: Yes, that's all right, go ahead.

Q. Tom, did you at that time, speaking about now the arrival of Mrs. Elliott the first night, did you in substance or effect say to her then, "Elaine, I have great plans for [248] you; I'm going to put you in a joint"?

A. I never said anything of the kind.

Q. Now, Tom, what was the substance of Mrs. Elliott's conversation with reference to whether or not she would return to Chicago?

A. She tried to avoid all talk of that. She told me she wanted to stay and be there with me.

Q. Did she then come to Yakima with you on this trip? A. Yes, sir.

Q. And did you register her at the Rest Haven

(Testimony of Thomas T. Chamales.)

Motel as testified to by Mr. Dawson, I believe it was? A. Yes, sir.

Q. Now, did you then in Yakima have a discussion with her with reference to her returning to Chicago? A. Yes, sir, I did.

Q. Would you relate that, and where it took place?

A. Well, I was getting—it took place in the Rest Haven Motel. It was basically due that the family was putting so much pressure on me, because they knew the girl was in town, and mother had intercepted this letter, and she was very upset about it, and I told her out at the Rest Haven Motel that she had to go back to Chicago and she said well, she wasn't going to go back to Chicago, but she wanted to go to Denver, and she explained to me that there was some fellow in Denver who was married, who had a [249] family, who would take care of her and treat her the way she wanted to be treated, to have everything her way, and she said she didn't care for this fellow, but she didn't want to go back to Chicago, and she was going down there, and I questioned her about what she had—some of the things she had done in the past, and I told her I didn't think that it was right for her to do that. I told her her mother was in Chicago, I had met her mother, and I told her I thought it was her place to go back there.

Q. Did you have any conversation with her at that time with reference to arranging transportation for her?

(Testimony of Thomas T. Chamales.)

A. I told her that I would pay her way back to Chicago, but I would have no part of sending her to Denver.

Q. Now, Mrs. Elliott mentioned something about Mr. Sullivan being in town while she was at the Rest Haven Motel. Was he in town at that time, Mr. Sullivan?

A. Mr. Sullivan?

Q. Yes.

A. Yes, sir.

Q. Did you have any discussion with reference to the possibility of her returning or having transportation back to Chicago with Mr. Sullivan?

A. I told her I thought it could be arranged, yes, sir.

Q. And did she say anything at that time with reference to whether or not she would go back to Chicago? [250]

A. Yes, sir, she said she didn't want to go back, that she thought she would go to Denver.

Q. Then I gather from Mrs. Elliott's testimony that you then shortly thereafter went to Seattle?

A. Yes, sir.

Q. And how was that transportation had?

A. We went in Mr. Sullivan's car.

Q. And who was in the car?

A. Mr. Sullivan, Elaine, and I.

Q. Then when you got to Seattle on that trip was there any conversation had between you and Mrs. Elliott with reference to the future, between you two, or what she should do if anything?

A. I advised Mrs. Elliott to go home to Chicago. I asked her please not to call me any more or write

(Testimony of Thomas T. Chamales.)

me, but to leave me alone, I was in a lot of trouble with the family because of her, and I advised her not to go to Denver. Mrs. Elliott told me when I finally told her that I was going to leave and go back to Yakima that——

Q. Well, now, what did you say when you said you were going to leave and go back to Yakima?

A. I told her, I said “I’ll pay your way back to Chicago; I won’t have any part of sending you to Denver.”

Q. Now where was this, Tom, when you had this conversation?

A. That was in the Wilhard Hotel. [251]

Q. In Seattle?

A. In Seattle. I told her I wouldn’t have any part of sending her to Denver. I told her that I was going back to Yakima, and if she wanted to go back to Chicago, to call me over there and tell me, and I’d furnish her with the transportation, but that I would not have anything to do with the Denver deal.

Q. What did she say then?

A. She told me at that time, she said “You’re not really leaving, are you?” I started to go out, I put some money on the dresser and I started to go out, and I said “Yes, I’m leaving,” and she said “Well, you can’t leave.” I said “I have to; my father is expecting me back, I have to get back; I told you what to do, call me over there if you decide you want to go to Chicago,” and she told me at that time that if she couldn’t have me, she said nobody

(Testimony of Thomas T. Chamales.)

could, and that she was going to get even with me.

Q. Describe what her attitude or feelings were, and not your conclusion, but as to how she acted, if anything; in other words, you'll have to describe if you can what she did in this final departure, and said; not your conclusions, but what you saw.

A. Well, I knew that she was very, very mad, that she thought——

Q. No, not that——

The Court: I don't think you should say what she [252] thought. Describe her appearance, and what she did.

Q. That's what I meant.

A. She wanted to stay with me. She was going to stay with me no matter what I told her. That is my conclusion.

The Court: Well, we don't want your conclusion. The jury will disregard the conclusion of the witness. You're supposed to testify to facts, what she said and did, and how she appeared, not what your conclusions are.

A. Well, she appeared very emotionally upset. I could see, I mean, I was even—I thought——

Q. No, not what you thought. You testified she said she would get even with you if you walked out and left her. Is that about the substance of that conversation? Was there or was there not anything else said at that time?

A. She said she was going to get even with me, yes, sir, on one way or another.

Q. All right; now, did you then leave her there?

(Testimony of Thomas T. Chamales.)

A. Yes, sir, I did.

Q. Did you again see her then after that time other than in connection with these proceedings?

A. No, sir, I did not see her after that time.

Q. Now, Mr. Chamales, after her arrival in Seattle on the second trip, and the next day, I believe at some restaurant, I'm not sure, but the next day, did you tell her, Mrs. Elliott, when she asked you as to what you meant by [253] a joint, that you meant a house of prostitution?

A. I never mentioned a house of prostitution.

Q. Did you in Yakima at the Rest Haven Motel tell her in substance or effect that you wanted her to go into a house of prostitution?

A. I never said anything of the kind to Mrs. Elliott.

Q. Did you at any time or at any place tell Mrs. Elliott that you had plans for her to go into a house of prostitution?

A. No, sir, I did not.

Q. Did you at any time or any place tell her that you had several girls working for you?

A. No, sir, I did not.

Q. You heard Betty DesCorreau testify?

A. Yes, sir.

Q. Did you have some dates with her in Seattle at about the time she said?

A. Yes, sir. I'm not sure about the time, but I had a couple of dates with her in Seattle.

Q. Without relating any conversation, Tom, how did you happen to know where she was or get in touch with her on this first date?

(Testimony of Thomas T. Chamales.)

A. I met a fellow she had been out with I think a couple of weeks before, and he said that she was over there.

Q. You just got it from him? [254]

A. Yes.

Q. You can't relate the conversation. All right now, did you then when you called on her, did you tell her in substance or effect "I'm a pimp"?

A. I did not, sir.

Q. Did you in substance or effect discuss with her the subject of prostitution?

A. I never did.

Q. Did you in substance or effect tell her that you had, then or at any time, tell Miss DesCorreau that you had a girl coming in from California on the plane?

A. I never told her anything like that, sir.

Q. That was going to go into a house of prostitution for you?

A. No, sir, I did not say that.

Q. Did you tell her that you had girls working for you? A. No, sir, I did not say that.

Q. Did you have any discussion with Betty DesCorreau at any time, any place, with reference to the subject of prostitution, being a pimp——

A. No, sir.

Q. ——or having girls working for you?

A. No, sir, I did not.

Q. Did you tell her that you were going to the plane and meet this girl and then hit her in the teeth to teach her who was boss? [255]

(Testimony of Thomas T. Chamales.)

A. No, sir, I did not.

Q. Do you recall this Miss DesCorrean having worked at the hotel, she said '46 or '47?

A. I don't recall the dates, but she worked there for a couple of weeks, I believe, yes.

Q. Do you recall when your father took over the hotel operation?

A. December 26, 1946, to the best of my recollection.

Q. December 26, 1946? A. Yes, sir.

Q. Now, had you seen Miss DesCorrean from the time that she worked in your hotel there as she testified, up until the time you saw her in Seattle?

A. No, sir; I might have seen her on the street and said hello in Yakima, but I never talked to her.

Q. Mr. Chamales, do you recall her attempting to borrow money from you? A. Yes, sir.

Q. And where was that, and what did she say?

A. It was in the Commercial Hotel, and——

Mr. Freeman: About when?

Q. Yes, about when?

A. About the end of August.

Q. Of what year? A. 1949. [256]

Q. The latter part of August, 1949?

A. Or the first part of September. She came in and said that she wanted some money for her rent.

Q. Did she say how much she wanted to borrow?

A. I think it was \$100.00, and I told her, I said "Well, that's a lot of money." She mentioned that she had gotten a job, I think she had been unemployed for a couple of months, my understanding.

(Testimony of Thomas T. Chamales.)

two or three months prior to that. I said I'd have to think about it. I had a date that evening with my present wife, Connie. I told Connie——

Q. You had a date with who, Tom?

A. Connie, my present wife over here, and I told Connie about it.

Q. You can't relate, Tom, the conversation between you and your wife.

A. Do you want me to relate it, you say?

Q. No, I say you can't relate a conversation between you and your wife. Did you make the loan to Miss DesCorreau? A. I did not.

Q. Did she then write you a note or letter?

A. Yes, sir, she did.

Q. Do you have that note or letter?

A. Pardon?

Q. Do you have that?

A. No, sir, I don't. [257]

Q. Can you tell the jury in substance what she said?

Mr. Freeman: Your Honor, I object to that, unless he can show that the note is no longer in existence.

The Court: I think the note would be the best evidence.

Q. Do you know where that note is at all, Tom?

A. No, sir, I don't.

Q. Have you made a diligent search for the note? A. Yes, sir, I certainly have.

Q. Is it in existence to the best of your knowledge? A. No, sir, it is not.

(Testimony of Thomas T. Chamales.)

Q. Now, would you state——

Mr. Freeman: Just a moment; do you know whether or not that note was destroyed? Did you destroy the note?

A. I don't know. I might have destroyed the note.

Mr. Freeman: But you don't know?

A. No, sir, I don't know. After the way I looked for it, thought, I imagine that it is gone.

The Court: All right, proceed.

Q. (By Mr. Olson): Would you just state, Mr. Chamales, what was the substance of that note?

A. Yes, sir. In substance the note said that "I thought you were a pretty nice guy until you wouldn't lend me the money, and now I don't think so any more, and I'm going to do whatever I can to degrade you and knock you and get [258] even with you for not giving me the money." That's what the note said in substance.

Q. Mr. Chamales, did you in substance and effect tell Miss DesCorreau that on the way back to Yakima that she couldn't go along because you had business in Cle Elum?

A. I have no recollection of seeing Miss DesCorreau on the way from Seattle to Yakima.

Mr. Freeman: I don't think, your Honor, that there's any testimony that they saw each other on the way from Seattle to Yakima. It was in Seattle, before they left for Yakima.

Q. Well, my question is, Tom, did you tell her in substance and effect that she could not ride back

(Testimony of Thomas T. Chamales.)

to Yakima with you about the time that she testified yesterday, because you had business in Cle Elum?

A. I have no recollection of speaking to her, and certainly I never told her that I had any business in Cle Elum.

Q. Now, Tom, have you ever had any connection at all with a house of prostitution any place?

A. No, sir, I have not.

Q. Have you ever had any girls working for you——

A. No, sir, I have not.

Q. ——of that nature?

A. No, sir.

Q. Have you ever been convicted of any offense, ever? [259]

A. No, sir, I have never been convicted of any offense.

Q. Did you, Tom, on the way from Seattle to Yakima at the time testified to or any other time stop at a house of prostitution and pick up a Mrs. Reed?

Mr. Freeman: Your Honor, I object to that; the only time we referred to in our case was the trip involved in the second transportation. His question is, did he have conversation with her on this time or any other time. I submit that is too indefinite and vague.

Mr. Olson: Well, I'm not asking for a conversation. I'll reframe the question.

The Court: All right.

Q. Tom, you heard the testimony yesterday that on a trip from Seattle to Yakima with Elaine

(Testimony of Thomas T. Chamales.)

Elliott, during the second time she was in Yakima, that on that trip you stopped at—Mr. Reed was in the car—that you stopped at a house of prostitution in Cle Elum and picked up Mrs. Reed. Is that so?

A. That is absolutely incorrect, sir. Mr. and Mrs. Reed had had an argument. The plan was originally that she was to drive back to Yakima with us, and she and Mr. Reed had an argument. She had taken the bus, and Mr. Reed had said to me that she had called him from there, and that they had patched it up, that he was going to have to make a stop and pick Mrs. Reed up. [260]

Q. Where did you pick her up?

A. We picked her up in a restaurant.

Q. Now, there has been introduced into evidence, Tom, an application for a money order which is signed "Tom Chambers." Did you purchase that money order under that name?

A. Yes, sir, I did.

Q. And why was that?

A. Well, my mother has a pretty good habit of going through my pockets all the time, and I knew she was very upset about this Elaine business, in fact, she seemed to get into my pockets about once a week to look all my papers over.

Q. What would she have found in your pockets?

A. Well, if she found that I had sent Elaine Elliott \$125.00 she'd be pretty upset.

Q. Well, how could she have found that?

A. I had a receipt, I wanted to get a receipt for

(Testimony of Thomas T. Chamales.)

the money, see, and the person that it was sent to and the person that signed it would be on the receipt. Well, if she found that I could say I picked it up around the hotel and was holding it for somebody; I didn't want her to find it out.

Q. Why was the money sent to Marge Mahoney?

A. Well, if it was sent to Elaine Elliott and my mother saw [261] that, that's all she'd have to know.

Mr. Olson: You may examine.

Cross-Examination

By Mr. Freeman:

Q. Mr. Chamales, I think you stated that you had intercourse with Miss Elliott on the first trip from Chicago on the Northern Pacific to Yakima?

A. Yes, sir, I did.

Q. Each night? A. I don't recall, sir.

Q. At least you had sexual intercourse once or more during the trip, is that right?

A. Yes, sir.

Q. What if any intercourse did you have with Miss Elliott at the Yakima Hotel—at the Commercial Hotel in Yakima after you arrived and after she was staying with you in the Blue Room?

A. I had intercourse with her there, yes, sir.

Q. Did you also have intercourse with her after she left your room and took a room of her own for a two-week period or a week and a half period on the first trip?

(Testimony of Thomas T. Chamales.)

A. The room that I moved her to? Yes, sir.

Q. You had intercourse with her there?

A. Yes, sir.

Q. Mr. Chamales, what was your marital status at the time you left Chicago with Miss Elliott for Yakima, on the [262] first trip?

Mr. Olson: Objected to as being immaterial, if the Court please.

The Court: Overruled.

A. Answer?

Q. Yes.

A. I was still married, but not living with my wife.

Q. And what was your marital status on the second trip? A. The same, sir.

Q. The same. Now, you admitted on the second trip that you registered at the Rest Haven Motel some time in August of 1949, is that so?

A. Yes, sir.

Q. Under the name of R. A. Sullivan?

A. Yes, sir.

Q. Can you explain to the court and jury why you registered under the name of R. A. Sullivan?

A. Yes, sir, I can. I think when a man is staying with a woman, I think for one reason that it's a common thing for him to under those conditions register under a different name. Secondly, my mother had word that Elaine was in town, and I knew she was trying to find out very much where she was located.

Q. When Mrs. Elliott came to Seattle on the

(Testimony of Thomas T. Chamales.)

second trip did you offer her or tell her that you were going to secure [263] accommodations for her at the Olympic Hotel under the name of Elaine Palmer? A. No, sir.

Q. You did not? A. No, sir.

Q. Mr. Chamales, did you or did you not register Elaine Elliott under the name of Elaine Palmer at the Wilhard Hotel in Seattle on the second trip?

A. Yes, sir, I did.

Q. Why did you use the name Elaine Palmer rather than Elaine Elliott?

A. I told you, sir, my mother was still trying to run me down.

Q. Your mother was in Yakima, wasn't she?

A. Yes, sir, but she was still trying to run me down. I had gone to Seattle before, and when mother didn't know what hotel I was staying she'd call the telephone operator long distance and say, "Just try to locate him at any hotel in Seattle."

Q. Were you worried more about what your mother might think of your conduct than what your own actions should be?

A. I explained to you, sir, the reason that Miss Elliott was there, that I was trying to get the situation cleared up and have an understanding with Elaine, and I was getting a tremendous amount of pressure from my family. [264]

Q. Did you have intercourse with Elaine Palmer or Elaine Elliott at the Wilhard Hotel that night?

A. Yes, sir, I believe I did.

(Testimony of Thomas T. Chamales.)

Q. Did you have intercourse with her at the Earl Hotel a few nights before, at Seattle?

A. Yes, sir, but I had no part of that. I mean, she used that, I believe, to—I told you she wanted to stay, that was her attitude the first night, and I had no intention of having intercourse with Miss Elliott that night; however, I did. I guess I'm human, I don't know.

Q. Now, you admit sending the money order to Marge Mahoney in Chicago on the second trip?

A. Yes, sir.

Q. Under the name of Tom Chambers?

A. Yes, sir.

Q. Will you look at that money order and see if that's the money order that was sent?

A. Yes, sir.

Q. Where was it sent from?

A. Tacoma, sir.

Q. Why Tacoma?

A. I just happened to send it from Tacoma, sir. I had no particular reason for sending it from Tacoma. I've spent a lot of time in Tacoma.

Q. Why did you send it to Marge Mahoney rather than Miss [265] Elliott?

A. I explained to you, sir.

Q. I'm asking for your answer.

A. Well, because of my mother; I didn't want my mother to find a receipt like that.

Q. But you were in Tacoma; your mother was in Yakima, wasn't she?

A. Yes, sir, but I'm liable to have that receipt

(Testimony of Thomas T. Chamales.)

in my pocket. I thought Elaine and I would get things clarified immediately and I would go back to Yakima.

Q. Well, now, Mr. Chamales, didn't you get a receipt when you caused this money order to be made out? A. Yes, sir, I did.

Q. What did you do with that receipt?

A. I put it in my pocket.

Q. Weren't you afraid your mother might find that receipt?

A. Yes, sir, but as long as it wasn't addressed to anybody my mother knew I knew, and it wasn't my name, she couldn't pin it down to me. I knew if she found out Elaine had been out there she would have been very upset. Mother ever since the war, for some reason or another, she's been going through everything.

Q. Now, Mr. Chamales, isn't it a fact that you told Miss Elliott at the time the money was sent that you were afraid the F.B.I.—you were sending it to Miss Mahoney [266] because the F.B.I. might find out you sent it? A. No, sir.

Q. That is not true? A. No, sir.

Q. And you did not say that to Miss Elliott?

A. No, sir, I did not.

Q. Now, on the first transportation did you ever actually offer Miss Elliott a job in Yakima after the two of you arrived in Yakima?

A. Yes, sir, I did.

Q. What did you offer her?

A. I told her after I think about the third day

(Testimony of Thomas T. Chamales.)

there that she would have a chance at the hostess job if she decided to stay, but that I wasn't going to give her the job——

Q. Did you offer her that hostess job?

A. Yes, sir, I did.

Q. When?

A. I said about the third day after she was here.

Q. I know, but when was that job to be open and available to her?

A. Well, it would probably take about ten days to give her that job.

Q. Well, you admitted she stayed at the Commercial Hotel about three weeks, didn't you?

A. That's right, sir. [267]

Q. Did the job open while she was there?

A. The job did not open to my knowledge, did the hostess job open, but the point was this, that we argued and it just seemed that one day we'd have an argument, maybe wouldn't speak for eight or nine hours; you can't very well put a person on a job with such a situation.

Q. Now, I think you testified that after she returned to Chicago from the first trip, that she had a number of telephone calls when you stated that she wanted to come back to Yakima, is that so?

A. Yes, sir.

Q. Did you place any calls yourself to Chicago?

A. Yes, sir. It——

Q. Just a moment; I'll ask for an explanation if it's needed, or your counsel may follow.

The Court: Just answer counsel's questions, and

(Testimony of Thomas T. Chamales.)

your attorney may bring out explanations if he feels it's necessary.

A. All right.

Q. I think you testified that you did not desire that Miss Elliott come to Yakima on the second trip, did you not?

A. That was common knowledge at my hotel, yes, sir.

Q. And the reason that you finally sent her the money was to have her come out and tell her in substance that the arrangement or the two of you living together or her [268] working for you wouldn't work, is that so?

A. Absolutely, sir. She told me—I mean I told her many times on the phone, and I couldn't get it into her head.

Q. Why didn't you go back to Chicago and explain the matter to her?

A. Because dad wanted me here.

Q. Who is Tex Reed, Mr. Chamales?

Mr. Olson: We'll object to that as being immaterial, if the Court please.

The Court: Overruled.

Q. Who is Tex Reed?

A. Tex Reed was a guest in our hotel, sir.

Q. Is he a friend of yours?

A. I knew him pretty well, yes, sir.

Q. You knew him pretty well? A. Yes.

Q. What is his occupation?

Mr. Olson: If your Honor please, I don't see the materiality.

(Testimony of Thomas T. Chamales.)

The Court: Overruled.

A. He's a carnival operator.

Q. Just a carnival operator?

A. That was my understanding, sir. He's a carnival operator; that's what he told me.

Q. Didn't you tell Mr. Worsham of the F.B.I. that Tex Reed [269] was a high class gambler and pimp?

Mr. Olson: I submit that counsel is inquiring into a collateral matter.

The Court: And he'll be bound by the answer, the same as you are.

Mr. Olson: Yes, sir.

The Court: Overruled.

Q. Did you not tell the F.B.I. that Tex Reed was a high class gambler and pimp?

A. I might have said he was a gambler, but if I ever said anything about pimp, I said it was hearsay.

Q. Did you or did you not tell Mr. Worsham and Mr. Clark of the F.B.I. that Tex Reed was a high class gambler and pimp?

A. No, sir, not that expression, gambler and pimp, no, sir.

Mr. Freeman: That's all, your Honor.

Mr. Olson: That's all.

(Whereupon, there being no further questions, the defendant was excused as a witness and resumed his seat with his counsel.)

Mr. Olson: The defendant rests, your Honor.

The Court: Any rebuttal?

Mr. Freeman: No rebuttal, your Honor.

The Court: The jury will step out just a moment.

(Whereupon, the following proceedings were had without the presence of the jury.) [270]

The Court: Well, all's well that ends well. I think we're going to get through in time. The Court's fears at the outset of the trial were unfounded, but I was in a rather difficult situation, because I have to go to San Francisco tomorrow, and it's a matter I couldn't postpone. You wish to renew your motions for the record, I presume.

Mr. Olson: Yes, your Honor. May I make an inquiry first? I take it an exception goes as a matter of course, this last testimony and inquiry about Mr. Reed, the record shows our objection to it.

The Court: Yes, the record may show that it goes in over your objection. I don't think it's necessary, but the record may show an exception to my ruling, in order to be on the safe side.

Mr. Olson: Comes not the defendant Thomas T. Chamales at the conclusion of all of the testimony, both the government and the defendant having rested, and in the absence of the jury and in the presence of the Court moves the Court for a directed verdict and a judgment of acquittal in favor of the defendant as to both counts of the amended information on the ground that there is no evidence, or no substantial evidence, to prove either of the offenses charged in the amended information;

that there is no proof as to the first count that [271] the transportation took place on the date charged in the amended information; that there is no proof of any kind, and certainly not substantial proof, that the transportation itself was for the purpose of prostitution, debauchery or immoral purposes.

The Court: I may have misunderstood you, Mr. Olson. Did you say there's no proof of the transportation?

Mr. Olson: For immoral purposes.

The Court: Oh, I see.

Mr. Olson: I think there's proof of the transportation. On the second count there is no proof that the transportation of Elaine Elliott was for the purpose of prostitution, debauchery, or other immoral purposes. For those reasons we ask that the case be dismissed, and that a judgment of acquittal or in the alternative a directed verdict in favor of the defendant, not guilty, be entered as to each count.

The Court: The motions will be denied, and exception shown of record for the defendant.

(The Court discussed with counsel in the absence of the jury the proposed instructions and the Court's action thereon.)

(Whereupon, the following proceedings were had within the presence of the jury.) [272]

(Counsel for the plaintiff and the defendant presented their final arguments to the jury, no portion of which has been transcribed except the following excerpt from the plaintiff's argu-

ment, as requested transcribed by counsel for the defendant.)

Mr. Freeman: * * * Miss DesCorreau, and you had an opportunity to observe her demeanor, I submit told the truth in this case. She said, and my recollection of her testimony is as follows: "He said, 'I'm a pimp, and I think you should know this, seeing as how you're a nice kid and I wouldn't want anything to happen to you, and I'm going to tell you all about it.' Question: What further conversation did you have with him that evening, Miss DesCorreau? Answer: He told me what sort of a racket he was in. Question: What did he say to you in that regard? Answer: He said that he had a few girls that he had working for him, and that he had one coming in Sunday evening. Question: Did he say from where? Answer: He said from California. Question: Did he say how? Answer: By plane. Question: What conversation did he have about the girl you were speaking about a moment ago? Answer: That she was coming in by plane Sunday evening, and that he was to meet her by plane, and he said the first thing he was going to do was slap her in the face to show her who was boss." [273]

Now, what has the testimony been with reference to this testimony, coming in from Chicago? Chamales said he was going to meet the plane; Miss Elliott said he was supposed to meet the plane; and Miss DesCorreau said he told her the girl was coming in by plane on a Sunday evening as testi-

fied by Miss Elliott, and certainly Miss DesCorrean's testimony is supported not only by Miss Elliott but by the plane and the time where the plane was to arrive.

Continuing: "Answer: And he said the first thing he was going to do was to slap her in the face to show her who was boss, and then he said he was going to put her in a low house of prostitution and after that he was going to put her in a lower one so she would get to know the business, but he said after about six months he would put her up on business of her own." He did indeed slap the face of Miss Elliott at the Rest Haven Motel in Yakima, as he told Miss DesCorrean he was going to do, and the testimony of Miss Elliott was almost identical with that of Miss DesCorrean to the effect that Chamales told her he was going to put her in one house of prostitution for several weeks and another house of prostitution for several weeks until she got enough experience so she could run a house of prostitution herself. I submit in that regard that in all respects the testimony if Miss DesCorrean is amply [274] supported.

Continuing with the testimony of Miss DesCorrean as I recall it: "Question: Was there any other conversation along that line with Mr. Chamales at your apartment that evening? Answer: He talked a lot about prostitution. Question: I see. Answer: And how they got these girls to do things for them. Question: Now, just go into that and tell us what he told you. Answer: He told me that first he treats them very wonderfully, sends them flowers and takes them out and all sorts of intentions, and

then they had this thing that's planned where he has an apartment, maybe, or something like a house, and he would have several good looking friends in, where they would ignore the girl when she came in, when she is used to all sorts of attention, she is probably a beautiful girl to begin with, or pretty; until the time that he would—the expression he used was get his hook in their belly, and they would do whatever he wanted them to do.”

(Whereupon, at the conclusion of argument of counsel, the Court instructed the jury as follows:)

Court's Instructions

The Court: Now, ladies and gentlemen, it becomes my duty to give you your instructions as to the law you are to follow in reaching or arriving at your verdict. There is a very definite division of responsibility and [275] duty in a case of this kind. It's the sole duty of the Judge to announce the law and instruct you on the law. It's the sole function of the jury to find and pass upon the facts in the light of the instructions that the Court gives you. It's your duty to regard my instructions as correct, and to follow them, and I ask that you consider them as a whole and not place undue emphasis on any one instruction or any part of the instructions.

Now, I wish it were possible for me in just a few simple everyday words to tell you what rules you are to follow here, but unfortunately lawsuits, cases such as this, are not as simple as that. I have to instruct you what the law, the Act of Congress is that

it is claimed has been violated here, what its elements are, and how you are to regard the evidence as it's applied to these alleged offenses, and by what other rules you are to be governed in reaching your conclusion as to the guilt or innocence of the defendant.

Now, in order that you may not be misled by these unfamiliar terms, when I refer to the plaintiff throughout these instructions I am referring of course to the United States. This is a case that is being prosecuted by the United States, and we call the United States the plaintiff. Thomas T. Chamales, Jr., is the defendant, and I think I need hardly add that Elaine Elliott is not a party [276] at all, she's simply been brought here as a witness in the case.

Now first, as to the Federal statute or Act of Congress that is alleged to have been violated, and I'll read to you only that portion of it which I think is pertinent to this charge, and will omit the part that is not involved in this case as I see it, the statute reads: "Whoever knowingly transports in interstate commerce any woman or girl for the purpose of prostitution or debauchery or for any other immoral purpose, or with the intent and purpose to induce, entice or compel such woman or girl to become a prostitute or to give herself up to debauchery or to engage in any other immoral practices, shall be punished as the statute provides."

Now, the amended information under which the defendant has been placed on trial charges in count one that Thomas T. Chamales, Jr., on or about the

10th day of March, 1949, did transport or cause to be transported Elaine Elliott from Chicago, Illinois, to Yakima, Washington, for the purposes of prostitution, debauchery, and other immoral purposes. Count two is identical to count one except as to the date of the alleged transportation, the second count alleging the transportation to have occurred on or about August 14, 1949. I might say in passing that the government doesn't have to prove the exact date; if it's anywhere near that date it is [277] sufficient.

The two counts of the information are to be considered separately by you, as they present separate and independent charges of offenses against the defendant. You may find the defendant guilty or not guilty on both counts, or guilty of either and not guilty of the other. In other words, you're to consider them and the evidence pertaining to them separately.

As there is no evidence of a purpose on the part of the defendant to transport Elaine Elliott for purposes of prostitution as to the offense charged in count one, I am withdrawing that element from your consideration; therefore in count one you are to consider only whether or not at the time and in the manner charged in count one the defendant transported Elaine Elliott from Chicago, Illinois to Yakima, Washington, for the purposes of debauchery and other immoral purposes. As to count two you are to consider whether or not the transportation therein charged and alleged was for the purposes of prostitution as well as debauchery and other immoral purposes.

Now, this information, which is the formal charge in the case, is a mere accusation presented against the defendant; that's the charge under which he's put on trial. It is not considered as evidence, and should not be considered by you as evidence against him, and you must indulge in no presumption against the defendant merely [278] because of the fact he has been charged with these offenses. To each count of the information the defendant has interposed a plea of not guilty. The effect of this plea is to place every material averment or statement of each count of the information in issue and cast upon the government the burden of proving the same to your satisfaction beyond a reasonable doubt. Later on I'll define to you what a reasonable doubt is.

You're to bear in mind that this requirement that the government must prove its case, that is to say, every essential element and statement contained in both counts of its information, to your satisfaction beyond a reasonable doubt, is to be considered by you as being a part of every other instruction which I have given you in this case. In other words, as I go along, if I say "If such and such has been established" I'll not repeat every time "to your satisfaction beyond a reasonable doubt" but it should be regarded by you as being in there; it should be considered as a part of every instruction I give.

As to count two of the information, the defendant Thomas T. Chamales, Jr., would be guilty as charged if he transported or procured or obtained transportation for Elaine Elliott on or about August

14, 1949, from another state into the State of Washington, either for the purpose of placing her in a house of prostitution, or transporting [279] her to Yakima that she may enter a house of prostitution, or that he transported her to Yakima for the purpose of himself having sexual intercourse with her, if you find from the evidence that he is not her husband. If you find from the evidence that the defendant transported or procured or obtained transportation for Elaine Elliott for either or any of these purposes, then he would be guilty of the crime charged against him in count two of the amended information. What I'm trying to say is, ladies and gentlemen, it isn't necessary for the government to prove all these purposes, transportation for debauchery, prostitution and other immoral purposes, but the proof of any one is sufficient.

The statute or law on which the prosecution is based in this case is directed at those who knowingly transport in interstate commerce any woman or girl for the purpose of prostitution, debauchery, or other immoral purposes, or with the intent and purpose to induce, entice or compel such woman or girl to become a prostitute or to give herself up to debauchery or engage in other immoral practices. The statute thus aims to penalize only those who use interstate commerce with a view toward accomplishing the unlawful purposes.

To constitute a violation of the statute it is essential that the interstate transportation have for its [280] dominant object or be the means of facilitating or effecting the proscribed or forbidden ac-

tivities. An intention that the woman shall engage in the conduct outlawed must be found to exist at the time the transportation took place, and must be the dominant motive of such interstate movements, and the transportation must be designed to bring about such result. Without that necessary intent and motivation immoral conduct during or following the journey is insufficient to subject the transporters to the penalties of the statute.

In a prosecution for violation of the statute to which I have directed your attention, as charged in the two counts of the amended information, intent may be inferred from all the facts and circumstances. The intent with which a defendant acts is rarely expressed verbally by a defendant, but must be drawn and arrived at by you by taking into account and consideration all the facts and circumstances connected with the transaction established by the evidence.

In determining the defendant's intent you are entitled to consider and should consider the conduct of the defendant and Elaine Elliott as to each of the two counts of the amended information at a reasonable time before the alleged transportation and for a reasonable time thereafter as bearing upon the defendant's intent [281] in transporting her or in procuring or obtaining transportation for her to and into the State of Washington. In cases of this kind it is competent to show previous as well as subsequent actions of the defendant and his contemporaneous statements and declarations as tending to give the background for and to show the purpose for

which the transportation was actually accomplished. In cases of this kind it is necessary to explore previous and subsequent conduct and relationships in order to show the purposes for which the actual transportations charged in the two counts of the amended information were made.

You are further instructed that the only offense with which the defendant Thomas T. Chamales, Jr., is charged is the transporting or assisting in the transportation of Elaine Elliott in interstate commerce for the purposes charged in the two counts of the amended information. It is immaterial for your consideration in the case whether or not Elaine Elliott is of chaste character. Her character and reputation are not in issue in this case. The only question with which you are concerned is whether or not Thomas T. Chamales, Jr., did or did not do the actions charged against him in the two counts of the information. Likewise it is no defense that Elaine Elliott may have accompanied the defendant willingly or voluntarily on either or both the two trips. [228] The girl's purpose in making the trips is immaterial.

As to count two, it is not necessary in order to sustain a finding of guilty that the said Elaine Elliott actually engaged in prostitution in Yakima, Washington, after her arrival there, if it was the defendant's intent at the time of transporting her from Illinois to Yakima, Washington, or procuring or obtaining that transportation, that she should engage in prostitution. In other words, it is the defendant's intent at the time of the transportation or at the

time he procured or obtained transportation for her to Yakima, Washington, that you are concerned with, and it is immaterial whether or not the purposes were actually consummated at the termination of the journey.

With relation to the testimony of Betty Dorene DesCorreau you are instructed to confine and use the use of her testimony entirely to the question of intent or purpose as it relates to the crimes which are charged in the amended information. Even if you should find that the defendant was immoral or had committed other violations he is not on trial for these violations, but you may take the testimony of Betty Dorene DesCorreau, with what credibility you give her, and determine whether or not that throws any light upon the question of the intent of the defendant as charged in the counts of the amended information. [283]

The word "prostitution" as used in the information means a practice of offering the body of a woman to an indiscriminate intercourse with men for gain. A woman who indulges in such practice is known as a prostitute. The term "debauchery" as used in the statute has the meaning of sexual immorality, that is, it has the idea of a life which leads eventually or tends to lead to sexual immorality. This does not depend upon previous sexual purity. Whether the woman be pure or impure, if her transportation be for the purpose of sexual immorality the statute is violated. The word "other immoral purposes" as used in the statute cover sexual intercourse between a man and a woman who are not

or condition. Where circumstantial evidence is relied upon, you are entitled to consider all the circumstances together in order to determine [286] whether or not they lead to the condition sought to be proven. This distinction may sound technical, but it's very simple. If a witness sees a man walking along the beach and testifies to it, that's direct evidence. If the witness merely sees human footprints and testifies to that, that's circumstantial evidence that someone walked along the beach.

It is your duty to consider such direct evidence as you consider to have been established, together with such circumstantial evidence as has been introduced, together with such inferences as you may readily deduce from the circumstantial evidence. You should consider all the evidence, both direct and circumstantial, and not rely upon either direct evidence alone or circumstantial evidence alone in your endeavor to arrive at the determination of the evidence before you.

When a conviction is sought upon circumstantial evidence, then each successive independent fact necessary to complete the chain of independent facts by which the government seeks to establish the guilt of the defendant must be established to the same degree of certainty as the main fact; that is, each link in the chain must be proven beyond a reasonable doubt. The circumstances must all concur and must be such as are opposed to any reasonable hypothesis or theory of innocence of the defendant, [287] and incapable of explanation upon any reasonable theory other than that of the guilt of the defendant. The

degree of certainty must be equal to that of direct testimony. If it lacks this and the lack is sufficient to raise a reasonable doubt, you must give the defendant the benefit of such doubt.

Now, the defendant is presumed to be innocent of the charges with which he is accused here until guilt is established to your satisfaction beyond a reasonable doubt. This presumption is one of the defendant's substantial and important rights. It attaches to the defendant, continues with him throughout all steps of the trial and throughout all steps of your deliberations as jurors. Until you have become satisfied of the defendant's guilt beyond all reasonable doubt, notwithstanding the presumption of innocence with which the law surrounds him, you must continue with that presumption, giving to it full weight and credit.

Now, the term "reasonable doubt" as the term implies, is a doubt that is based upon some good reason or for which some good reason might be given. It is such a doubt as a prudent and considerate man would consider if he were called upon to answer concerning one of the more important affairs of his own personal life. In a trial, a reasonable doubt is such doubt as will cause you as [288] jurors, being reasonable, prudent, and considerate, to hesitate or waver before acting upon the truth of the matters alleged. Reasonable doubt may arise from the evidence in the case or from the lack of evidence. You will not be swayed, moved or become frightened by doubts which are purely arbitrary or capricious and fanciful. On the other hand, you will not convict

The Court: I might say at this time, I think I neglected to mention, at one time during the trial I sustained objections to certain documentary evidence that was offered by the defendant, and said I would sustain the objection but wished to look into the matter further and would indicate if I changed my ruling. I suppose it's been assumed that I have not changed my ruling, and that the proffered exhibits may be considered as definitely and finally rejected. I have decided to stand [291] by my former ruling. Now you may take your exceptions, Mr. Olson.

Defendant's Exceptions to Instructions

Mr. Olson: Your Honor, I'm not sure on the number of these, I'll have to refer to it—I have the government's proposed instructions numbered as handed to me, but I'm unable to refer to it as to what number.

The Court: Well, they were blank when they were handed to me. I suppose you had better identify them by subject matter. If you need any help I can tell you what the instruction was, if you'll give me an idea what you have in mind.

Mr. Olson: The defendant excepts to the giving of the instruction—have you got your Honor's instructions numbered?

The Court: Yes.

Mr. Olson: It's instruction number 4 as given to me by the government, the one that says they can find him guilty if they find him guilty for one of the three purposes.

The Court: Oh, yes. Of course, these instruc-

tions will not be filed, of mine, in the case; they will simply be a part of the record as taken down by the court reporter. That was the instruction in which I instructed the jury in effect that it wasn't necessary for the government [292] to prove all of the purposes, but the proof of any one would be sufficient?

Mr. Olson: Yes.

The Court: All right.

Mr. Olson: We except to the instruction referred to on the ground that under the amended information under which the defendant has been tried in this case the government has seen fit to charge that the defendant transported Elaine Elliott for the purposes of prostitution, debauchery and other immoral purposes, and since the government in its amended information upon which it has placed the defendant on trial has elected in the amended information to charge the defendant with all three, using the word "and" instead of "or" we except to the instruction which authorizes the jury to find the defendant guilty if the jury finds that the defendant committed any one of the three mentioned unlawful acts of intent, as being an authorization to find the defendant guilty in a manner otherwise than is charged by the amended information.

The Court: I don't think this affects your exception, but in giving that instruction I limited it to count two, for the reason that I have withdrawn——

Mr. Olson: I think that's correct.

The Court: Yes. [293]

Mr. Olson: The defendant excepts to the giving

of the instruction, that part of the instruction with reference to the jury's right to find the defendant guilty of intent to transport in interstate commerce Elaine Elliott for immoral purposes, that the jury can take into consideration the intent of Elaine Elliott as having any bearing whatever upon the intent of the defendant Tom T. Chamales. Now, your Honor, I have that notation on what constitutes proposed instruction number five of the government. As I understood your Honor to read that, when your Honor read that instruction you said they could take into consideration what intent Elaine Elliott and the defendant Tom T. Chamales had. Now, I'll confess that sitting there listening to them they come a little fast, but I have that definitely in my mind that that's what you said.

The Court: I didn't intend to say that; I intended to say they could take into consideration the conduct of the defendant and Elaine Elliott at a reasonable time before and after the transportation. Can you find that particular part of the instruction? It's near the beginning. It starts out "In determining the defendant's intent you are entitled to consider and should consider the conduct of the defendant and Elaine Elliott." [294]

Mr. Freeman: That's in one of the government's proposed instructions.

The Court: It's the fifth one. "In determining the defendant's intent you are entitled to consider and should consider the conduct of the defendant and Elaine Elliott." That's the fifth one in the order in which you handed them to me.

Mr. Freeman: The instructions begin with "In considering"?

The Court: The way you have it, it's "In trying to arrive at the defendant's intent."

(Whereupon, the reporter read from the Court's instructions as given, as follows: "In determining the defendant's intent you are entitled to consider and should consider the conduct of the defendant and Elaine Elliott as to each of the two counts of the amended information at a reasonable time before the alleged transportation and for a reasonable time thereafter as bearing upon the defendant's intent in transporting her or in procuring or obtaining transportation for her to and into the State of Washington.")

The Court: Well, go ahead with your exceptions.

Mr. Olson: I wish to state in fairness to the Court that the instruction I have my notation on is not that instruction. That is proposed instruction number 8, [295] in the ones as given to me, and the instruction which I have, I'm frank to say I could be in error in my understanding of it, but I did think that's what your Honor said. This starts out "In a prosecution for violation of the White Slave Traffic Act, as charged in the two counts of the amended information, intent may be inferred." The part I thought you said is not in the typewritten portion of the instruction, so unless your Honor interpolated on that instruction——

The Court: How does it begin?

Mr. Olson: "In a prosecution for violation of the White Slave Traffic Act——"

The Court: Oh, yes, that's 7.

Mr. Olson: It's proposed 5 in mine.

The Court: Oh, yes; that's "In a prosecution for violation of the White Slave Traffic Act as charged in the two counts of the amended information, intent may be inferred from all the facts and circumstances. The intent with which the defendant acts is rarely expressed verbally by a defendant, but must be drawn and arrived at by you by taking into account and consideration all the facts and circumstances connected with the transaction established by the evidence." I changed part of it.

Mr. Olson: Then the defendant excepts to the Court's instruction number 7 with reference to the jury's [296] consideration of the testimony of Betty Dorene DesCorreanu, particularly that portion of the instruction which says that the jury could consider her testimony with what credibility they wish to give her, in determining whether or not that throws any light upon the question of the intent of the defendant as charged in the counts of the amended information, it being our position that the testimony of Betty DesCorreanu did not in any way relate to count one, and that it could not therefore be considered by the jury in any regard in determining any intent on the part of the defendant with the transportation charged by count one of the amended information.

The Court: I'm not sure of that number, but I think you've sufficiently identified it by subject

matter. It's the only one I gave with reference to that witness.

Mr. Olson: Yes, I think so. It's number 7 of the copy that's been handed to me, the instruction relating to Betty DesCorreau.

The Court: Yes, I know the one you mean. It was number 9 in the copy I had. They must have had several editions of their proposed instructions.

Mr. Olson: We'll have to have Frank keep them in the same order.

Mr. Freeman: I put them together, your Honor.

Mr. Olson: The defendant excepts to the Court's failure [297] to give his proposed instruction number 9, reading "You are instructed that even though you find from the evidence beyond a reasonable doubt that the defendant Thomas T. Chamales, Jr., had the intention that he would put the woman Elaine Elliott in a house of prostitution or have immoral sexual relations with her or allow or arrange for someone else to have immoral sexual relations with her but that he did not form such intention until reaching the state of Washington, then you must return a verdict of not guilty." We submit that that instruction is of particular moment with reference to each of the counts, in that from the testimony the jury could well have found even though *the* find the defendant was guilty of intention to place Elaine Elliott in a house of prostitution, that any such intention was not present or not formed until after the arrival of Elaine Elliott in Washington. It has particular reference to the second count, without waiving its applicability to

the first count, in that the jury might find from the testimony particularly of—well, from the testimony, that some such suggestion might have been made in a final effort on the part of the defendant to persuade the witness Elaine Elliott to leave him alone, but that such intention was not in the defendant's mind at the time of the transportation. The instruction having been requested [298] and being applicable to the evidence and one of the defenses of the defendant, should have been given.

The defendant excepts to the Court's failure to give defendant's proposed instruction number 11—is that sufficient identification, your Honor?

The Court: It is on yours, as you filed them with your numbers on them, so they will be in the record for identification.

Mr. Olson: The said instruction was not otherwise covered by the instructions given, in that the proposed instruction told the jury in accordance with the decision of the court cited thereon that in order to find the defendant guilty the jury would have to find that the defendant had a plan in mind at the time of such—a plan of sexual relations at the time he transported the witness across state lines, and that such plan must have existed in the defendant's mind, as distinguished from a mere hope, wish or desire; that the statute under which the defendant is charged requires specifically that the transportation be done for the purposes mentioned in the statute and in the amended information, and that if the jury found that the transportation was not under a plan for that purpose,

that then the defendant should be found not guilty, even though the jury might find that he recognized or might have had some wish or desire or [299] some wishful thinking about immoral relations; that the instruction was apropos to the evidence of the defendant and the other witnesses in the case, and should have been given in order to adequately present defendant's side of the case to the jury.

Mr. Olson (continuing): The defendant excepts to the failure to give his proposed instruction number 16 in which the court was requested to instruct the jury that if the jury found that the transportation of Elaine Elliott was with the intent that she was to be employed in the defendant's hotel at Yakima in a legitimate and honest position, that then they would return a verdict of not guilty, or if they found the defendant's intent was some other lawful purpose, then that they should also return a verdict of not guilty; and further, that if they found that the transportation of Elaine Elliott was for an immoral purpose, if that was a secondary or lesser intention to a lawful or legitimate purpose of transportation, they should find the defendant not guilty. The defendant submits that that instruction as requested by him was particularly applicable under the evidence in this case, both under the evidence given by the government and by the evidence given by the defendant himself that the only discussed purpose between the plaintiff and the defendant—between the government's witness Elaine [300] Elliott and the defendant prior to the first trip was that of employment in the

hotel with which the defendant was connected in Yakima, and further, that the defendant's testimony supported by other testimony in the case that the purpose of the second trip was a lawful purpose, to wit, that of having the witness dissuaded from bothering the defendant, pursuing the defendant, making phone calls to the defendant, writing letters to the defendant, and that the instruction as requested was not covered by the other instructions, no place in the instructions given by the court to the jury was the jury instructed that if they found that the transportation of Elaine Elliott—that the main purpose of the defendant in transporting or causing to be transported Elaine Elliott to Yakima was for employment in his hotel, that they would find him not guilty. We submit that in view of the evidence on that point, particularly with reference to the employment in the hotel as well as the lawful purpose of the second transportation, that that requested instruction number 16 should have been given in order for the defendant's evidence to have been properly considered by the jury.

The Court: All right, bring in the jury.

(Whereupon, the following proceedings were had within the presence of the jury.) [301]

The Court: You will recall, ladies and gentlemen, that I gave you an instruction with reference to the manner in which you were to regard the testimony of Betty Dorene DesCorrean, and I instructed you in effect that you were to limit her testimony entirely to the question of intent or purpose, and I said as it related to the crimes charged

in the amended information, and that you should consider it and give what credit you thought it was entitled to in passing upon the question of the intent of the defendant as charged in the counts of the amended information. That was an error on my part; I shouldn't have said counts or crimes; I should have said in considering the intent of the defendant as alleged in the second count of the information, because the testimony of Miss DesCorrean was confined entirely to the second count, had nothing to do with the first count whatsoever, and you are to regard my instruction as having been given in that way and as corrected, so her testimony is to be considered by you only in connection with the intent as to count two of the amended information. Will counsel approach the bench now?

(Whereupon, the following proceedings were had at the bar out of the hearing of the jury.)

The Court: I'm giving counsel an opportunity to except to my corrected instruction, out of the hearing of [302] the jury.

Mr. Olson: No, your Honor.

The Court: There's no exception taken. I have to give you that opportunity, to keep the record straight.

(Whereupon, the following proceedings were had within the presence and hearing of the jury.)

The Court: Now, let's see, we have to swear the bailiffs.

(Whereupon, Irene Keenan and C. W. Carlile were sworn as bailiffs.)

The Court: The alternate juror will be excused. We thank you for sitting patiently through the trial here, but we'll have no further use for you as we send the other twelve out now to deliberate. The jury will retire to consider its verdict. I think I should say that the alternate is to report back for duty on the 22nd of January at 10 a.m. You will be excused until then. All right, the jury may retire to consider its verdict.

(Whereupon, at 4:07 p.m. the jury retired to deliberate upon its verdict.) [303]

Monday, January 22, 1951.

Spokane, Washington,

COURT'S RULING ON MOTION FOR NEW TRIAL

(Honorable Sam M. Driver, United States District Judge.)

The Court: I will readily concede that there are some very substantial and trying questions that have arisen in this case. It seemed to have presented more than the usual number of problems, I think because of the war experience and the evidence as to his psychiatric condition, which could have been adduced here, and also because of the circumstances with reference to the past of the prosecuting witness and the things that could have been disclosed

as shown by the documentary evidence here. I did, however, give careful consideration to all of these matters, with some possible exceptions here as to counsel's argument to the jury, but the others I did give careful consideration to then, and within the limits of the time available did the best I could to look up what I thought was the applicable law regarding these, I think the principal questions that were raised here, and my rulings were the result of my best judgment based upon such research as we were able to make in my office in the limited time. It may very well be that there were errors committed here, but I still feel that my rulings were correct, [304] and I'll have to deny the motion. The motion for new trial will be denied, and exception will be allowed of record if one is necessary.

(Further argument by counsel.)

The Court: Well, I think the evidence disclosed here that the defendant's course of conduct has been what I would regard as dangerously anti-social, and there should be some checkup on him, and I think the sentence should be severe enough to at least look toward accomplishment of that purpose.

We have the rather unusual situation that we have a very respectable indication and evidence that the man has some emotional or psychiatric unbalance that was due to his war experiences, and an effort was made, and I permitted that to be done, an effort to be made to have him get treatment without prosecuting him for violation of the White Slave Traffic Act, and that didn't work out. I don't know, it may not have been wholly his fault, but at any

rate the matter of trying to work this out in an informal way so that he could go to the Veterans' Bureau and have an examination and such treatment as he might require, didn't pan out, and I have no confidence in this matter of voluntary treatment in the case of a patient such as this.

I'm not a psychiatrist, I can't tell what his [305] condition is, but certainly he gave every evidence on the witness stand of being a very intelligent, very clever man, and I thought it seemed to me very much in possession of his faculties. He did some good acting and some intelligent testifying, and it would seem to me that in his situation, that my sentence should be sufficiently substantial to enable the Federal authorities to give him treatment if he requires it, and when you give a man over a year it means he's eligible for parole when a third of his sentence is served. It doesn't mean when you sentence a man to two years he's going to stay there two years if his behaviour is proper and he's a fit subject for parole in the judgment of the paroling authorities, but I think it should be sufficiently substantial so if he does require treatment to get him over these tendencies that he's displayed, that make him dangerous to society, I think it should be substantial enough to accomplish that if it's necessary. I'll leave the sentence as it is, and I think as I announced before, the bail on appeal if appeal is taken will be \$3,000. [306]

REPORTER'S CERTIFICATE

United States of America,
Eastern District of Washington—ss.

I, Stanley D. Taylor, do hereby certify: That I am the regularly appointed, qualified and acting official court reporter of the United States District Court for the Eastern District of Washington. That as such reporter I reported in shorthand and transcribed the foregoing proceedings before the Honorable Sam M. Driver, Judge of the United States District Court for the Eastern District of Washington, held on January 9, 10, 11 and 22, 1951, at Spokane, Washington.

That the above and foregoing contains a full, true and correct transcript of the record of proceedings at the trial and the court's ruling on motion for new trial, omitting only the matters noted therein, in the cause of United States of America vs. Thomas T. Chamales, Jr.

Dated this 19th day of February, 1951.

/s/ STANLEY D. TAYLOR,
Official Court Reporter.

[Endorsed]: Filed Feb. 26, 1951. [307]

[Endorsed]: No. 12878. United States Court of Appeals for the Ninth Circuit. Thomas T. Chamales, Jr., Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Filed March 7, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America,
Eastern District of Washington—ss.

I, A. A. LaFramboise, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify that the documents annexed hereto are the Original

1. Information.
2. Amended Information.
3. Motion for transfer of cause from Yakima to Spokane.
4. Copy of Order transferring cause to Spokane.
5. Defendant's Plea of Not Guilty.
6. Court Reporter's Transcript of Trial. (Impractical to annex this document because of bulk. Enclosed herewith, but not annexed hereto.)

7. Exhibits:

Defendant's 1—Marriage license and certificate of marriage.

Defendant's 4—Letter, Elaine Elliott to Defendant.

Plaintiff's 11—Application for Western Union Money Order.

Plaintiff's 12—Western Union Money Order.

Plaintiff's 13—Registration Card—Earl Hotel.

Plaintiff's 14—Registration Card — Wilhart Hotel.

Plaintiff's 15—Registration Card—Rest Haven Motel.

8. Defendant's Proposed Instructions.

9. Verdict.

10. Motion for new trial.

11. Affidavit of Harry L. Olson in support of Motion for new trial.

12. Order denying Motion for new trial.

13. Judgment and Commitment.

14. Notice of Appeal.

15. Designation of Contents of Record on Appeal.

16. Supplemental Designation of Record on Appeal.

17. Statement of Points.

18. Order extending time for filing Record on Appeal.

19. Bail Bond on Appeal.

on file in the above-entitled cause, and that the same constitutes the record for hearing of the Appeal from the Judgment of the United States District Court for the Eastern District of Washington, in the United States Court of Appeals for the Ninth Circuit, as called for by the Appellant in his Designation of Record on Appeal, and Supplemental Designation of Record on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, at Spokane in said District, this 5th day of March, A. D. 1950.

[Seal] /s/ A. A. LaFRAMBOISE,
Clerk of said District Court.

United States Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

THOMAS T. CHAMALES, JR.,

Defendant-Appellant.

DESIGNATION OF RECORD TO BE PRINTED

In Compliance with Rule 19, Subdivision 6 of the Rules of the above-entitled court, the appellant herewith designates as that portion of the record

which is material to the consideration of this appeal as follows:

1. Information.
2. Amended information.
3. Defendant's plea of Not Guilty.
4. Court Reporter's transcript of the trial.
5. All exhibits received in evidence, being defendant's exhibits 1 and 4 and plaintiff's exhibits 11, 12, 13, 14 and 15.
6. Defendant's identifications 2, 3, 5, 6, 7, 8, 9 and 10 which were offered but not received.
7. Defendant's proposed instructions number 9, 11, 16.
8. Verdict.
9. Motion for new trial.
10. Affidavit of Harry L. Olson in support of motion for new trial.
11. Order denying motion for new trial.
12. Judgment and commitment.
13. Notice of Appeal.
14. Designation of contents of record on appeal.
15. Supplemental designation of record on appeal.
16. Statement of points.
17. Order extending time for filing record on appeal.

18. This designation.

19. Statement of points filed in this court.

Dated this 10th day of March, 1951.

/s/ HARRY L. OLSON,

Of Counsel for Defendant-
Appellant.

[Endorsed]: Filed Mar. 14, 1951.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS UNDER RULE 19,
SUBDIVISION 6

In compliance with Rule 19, Subdivision 6 of the Rules of the above-entitled court, the appellant herewith adopts the statement of points filed in the United States District Court for the Eastern District of Washington, Northern Division as the statement of the points upon which he intends to rely on this appeal.

Dated this 10th day of March, 1951.

/s/ HARRY L. OLSON,

Of Counsel for Defendant-
Appellant.

IN THE
**United States Circuit Court
of Appeals**
FOR THE NINTH CIRCUIT

THOMAS T. CHAMALES, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 12878

UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT

HARRY L. OLSON,
FREDERICK C. PALMER,
JOHN WM. McARDLE.

302 Miller Building
Yakima, Washington
Attorneys for Appellant.

JUN 28 1935

IN THE
**United States Circuit Court
of Appeals**
FOR THE NINTH CIRCUIT

THOMAS T. CHAMALES, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

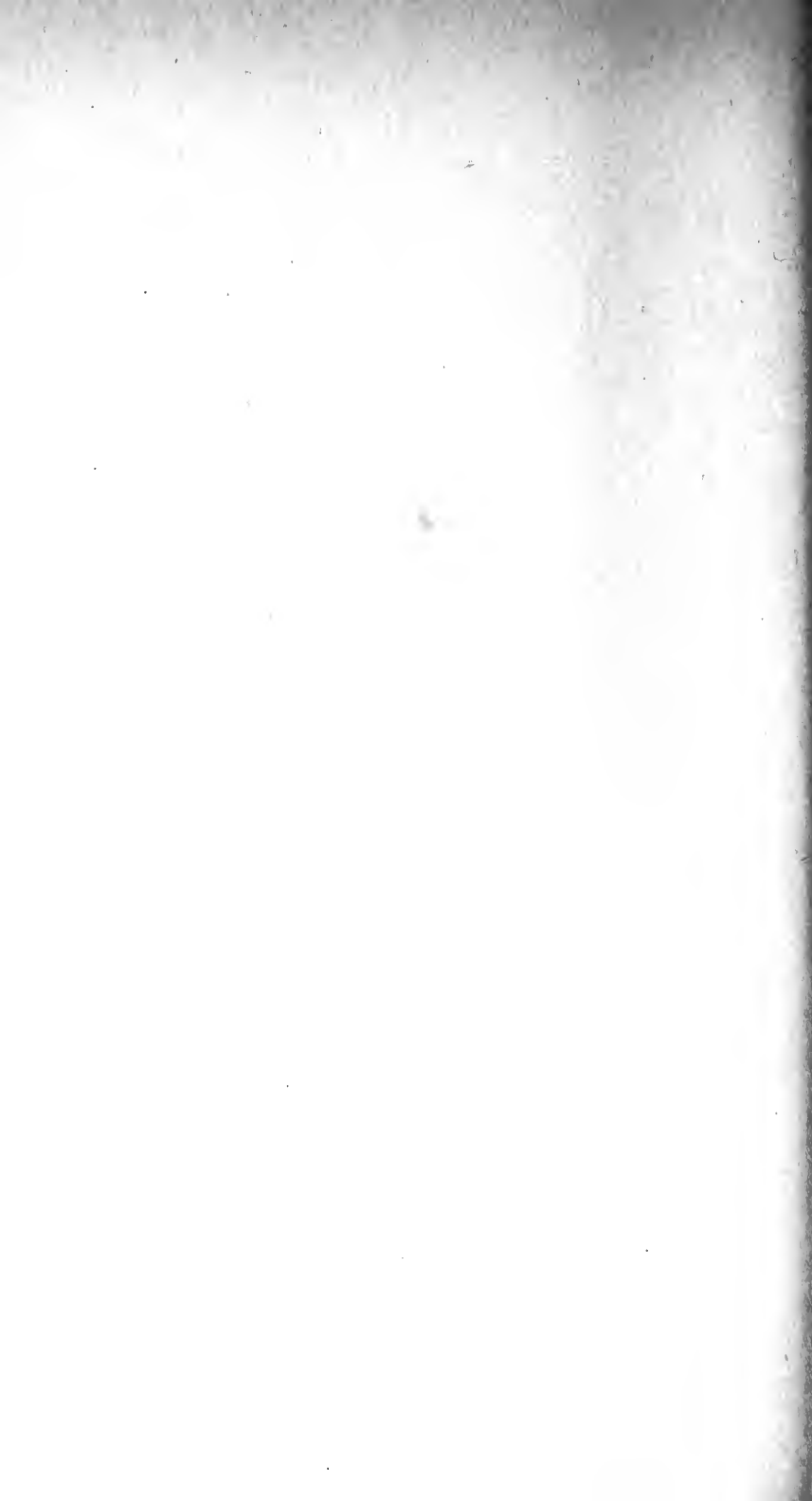
Appellee.

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Yakima, Washington
Attorneys for Appellant.



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STATEMENT REGARDING JURISDICTION

This action was commenced by the United States attorney filing an information and a waiver of hearing before a grand jury by the appellant. Shortly thereafter an amended information was filed charging appellant on two counts of violating the White Slave Traffic Act, 18 U.S.C.A. 2421, (R. 3, 4) 62 STAT. 812 as amended in 63 STAT. 96. The District Court has jurisdiction under 18 U.S.C.A. 3231.

Appellant was acquitted on count one, but found guilty as charged on count two of the amended information (R. 7), sentenced and the judgment and commitment entered by the District Court (R. 12, 13).

The case comes within the usual appellant jurisdiction of the United States Court of Appeals upon appeal from a final decision of the District Court of the United States 28 U.S.C.A. 1291. The judgment of the District Court was entered on January 22, 1951 and notice of appeal was filed on January 22, 1951 (R. 13, 14).

STATEMENT OF THE CASE

The appellant was charged as follows in the amended information:

"AMENDED INFORMATION

VIO: Sec. 2421, Title 18, U.S.C.

White Slave Traffic Act

The United States Attorney charges:

(All numerical references herein, unless otherwise indicated, are to the pages of the printed Transcript of Record. All italics are supplied by counsel).

Count I.

That Thomas T. Chamales, Jr., on or about the 10th day of March, 1949, did transport and cause to be transported, and aid and assist in transporting Elaine Elliot from Chicago, Illinois, to Yakima, in the Southern Division of the Eastern District of Washington, for the purpose of prostitution, debauchery and other immoral purposes.

Count II.

That Thomas T. Chamales, Jr., on or about the 14th day of August, 1949 did transport and cause to be transported, and aid and assist in transporting Elaine Elliot from Chicago, Illinois, to Yakima, in the Southern Division of the Eastern District of Washington, for the purpose of prostitution, debauchery and other immoral purposes.

Dated this 25th day of October, 1950.

/S/ HARVEY ERICKSON
United States Attorney

/S/ LLOYD L. WIEHL,
Assistant U. S. Attorney.

(Endorsed): Filed Oct. 25, 1950."

To this amended information the appellant plead not guilty on January 9, 1951 and the case came on for trial on said date before the United States District Court sitting in Spokane with a jury. The appellant was acquitted as set forth above, upon the first count and convicted upon count two.

The appellant, who was twenty-six years old at the time of the trial, was born in Chicago, Illinois and received his secondary education at St. John's Military School in Delafield, Wisconsin, graduating in the year 1942 at the age of seventeen. As soon as he reached eighteen, he entered the Army as a private and shortly thereafter qualified

to attend officer's candidate school at Fort Benning, Georgia. After graduating from officer's candidate school, he was commissioned a second lieutenant in the infantry and for approximately three and one half to four months thereafter instructed new recruits at Camp Wheeler in Macon, Georgia. After this tour of duty of instructing, appellant, at his own request, was shipped overseas to North Africa and after a short period of time in North Africa, he was ordered on to India where he volunteered for an organization which became known during the war as Merrill's Marauders. Merrill's Marauders engaged primarily in long range penetration behind the enemy lines in the jungle where they would establish road blocks and cut enemy lines of communication thereafter dispersing into small groups and hiding in the hills (R. 211). While engaged in this duty, appellant spent six months in the Burmese Jungle in almost daily combat. He received shrapnel wounds in both the feet and his head and also suffered a severe concussion, these injuries being received from a Japanese-thrown grenade. When the appellant came out of Burma, he weighed 98 pounds, his normal weight being in excess of 200. Appellant was hospitalized and after a rest leave following his discharge from the hospital, he again volunteered for guerilla duty in Burma with the Office of Strategic Services (R. 214) and was parachuted into Burma at a small town somewhat north of Lashio. Appellant, at this time, was a captain and spent approximately two years in Burma with the Office of Strategic Services, fifteen months being in

combat (R. 216). He contracted malaria and amoebic dysentery while in Burma and was engaged in continuous combat without relief for as long as eight months at a time. He was discharged from the Army in December, 1945 and was suffering from violent headaches (R. 217). At first these headaches were about two months apart and then they became approximately six weeks apart. He was also under emotional and nervous strain, which periods of tension would last anywhere from two or three days to a week. He received medical attention for his headaches after his discharge from the Army.

At this juncture the United States attorney objected to further evidence on appellants medical treatment and the court ruled that it was immaterial, sustaining the Government's objection (R. 220).

In January, 1947 appellant's father purchased the Commercial Hotel which was Yakima's leading hotel (R. 201), and appellant assisted in the operation and management of the same.

In the early part of 1949 appellant received a call from his father, his parents then living in Elgin, Illinois, which required him to make a trip to Chicago in March of that year. When he arrived in Chicago, he had lunch with a friend, one Martin McDonald, and in the luncheon conversation, the name of Elaine Elliot was brought up and Mr. McDonald arranged a meeting between appellant and Elaine Elliot (R. 58, 59). At the first meeting of appellant and

Mrs. Elliot she fell in love with him at first sight according to her testimony (R. 37). He took her out four or five times during a period of two or three weeks to various restaurants for dinner and also took her to a family dinner at the home of a friend of his, Dick Sullivan, in Chicago (R. 73) and to the home of appellant's sister and brother-in-law for dinner. It is undisputed that appellant treated Mrs. Elliot with the utmost courtesy, politeness and propriety during all the time that they were together in Chicago (R. 74). While the two of them were having dinner at a restaurant called the "Yar" they discussed Mrs. Elliot's coming out to Washington to work in the Commercial Hotel as a hostess or secretary for the appellant (R. 77). It was her suggestion that she might be of some help (R. 224). After about two weeks Mrs. Elliot decided to come back to Yakima with the appellant and her mother came down to the train with them to see them off (R. 78). On the trip out to Yakima, they shared the same compartment.

Upon arriving in Yakima appellant and Mrs. Elliot shared his suite in the Hotel Commercial for about a week and thereafter she moved to another room in the hotel where she stayed the rest of the visit in Yakima (R. 855). They had various arguments shortly after they arrived in Yakima and the quarreling continued for the next two or three week period that she remained out West and finally reached the point where it was decided that she was to return to Chicago (R. 86). She did not commence working in the hotel in either of the suggested jobs that had been discussed

due to both the constant quarreling and the further fact that the job of hostess in the dining room did not become available. Appellant furnished Mrs. Elliot with transportation back to Chicago, her ticket being delivered by one of his employees (R. 87).

Upon Mrs. Elliot's arrival in Chicago, she immediately called the appellant telling him how much she missed him and that she loved him (R. 88). During the months of April, May, June and July and the first part of August, 1949 while Mrs. Elliot was in Chicago she called the appellant many times from Chicago, her estimate being that she might have tried to reach him twenty times. The calls were collect and appellant was not often available as actually only about four or five calls were accepted (R. 89). Appellant in his testimony stated that some days the phone calls would run as high as fifteen or eighteen calls in one day and that he would persistently refuse them although he did accept some calls (R. 230). The frequency of the phone calls was also substantiated by the testimony of Clay Carroll, called on behalf of the appellant who at the time of the trial was a disinterested witness. Mr. Carroll (R. 205, 206) stated that collect calls from Mrs. Elliot would come in repeatedly during one day, that appellant would refuse to accept them stating: "Tell them I am out or can't be reached." That there would then be a lull for a period of time and then quite a few calls would come in again. That the majority of times appellant informed him that he was out and that he would not accept the calls. Mr. Carroll

further testified that he had a call from the Northwest Airlines in Chicago requesting that the hotel "o. k." Mrs. Elliot's transportation from Chicago to Yakima and that he give the Northwest Airlines Company a check at their Yakima office and that the Chicago office of the Northwest Airlines would then put Mrs. Elliot on the plane; that he had no way to authorize this and told them absolutely no (R. 205). In addition to the many phone calls, Mrs. Elliot wrote several letters and sent a couple of nasty telegrams according to her admission on cross examination (R. 91). Exhibit No. 4 was identified by Mrs. Elliot as one of the letters that she wrote appellant during the time that she was in Chicago between the first and second trips to Yakima. This exhibit indicates Mrs. Elliot's method of pursuing the appellant by her own written statement in which she said: "I have pursued you shamefully" (R. 99). During the first part of August 1949 there were additional phone calls with reference to Mrs. Elliot's coming West again. She definitely wanted to come according to her admission on cross examination (R. 94). She was asked by appellant if she was willing to work and she stated that she was. She further agreed to stay for good according to her testimony. Appellant states that he brought her out to Yakima the second time to convince her of the fact that everything was over between them. That further his mother and father were living at the hotel during this period of the phone calls and that they were very very upset about Mrs. Elliot's tremendous persistency and that something had to be done, par-

ticularly as far as the family was concerned, about getting her to stop (R. 232). He proposed to tell Mrs. Elliot this personally and that was the reason for his bringing her out (R. 232). Appellant did forward the money for Mrs. Elliot's plane ticket from Chicago to Seattle, the money being sent to her room mate, Marge Mahoney in the amount of \$125.00. Upon Mrs. Elliot's arrival in Seattle on August 14, 1949 after first going to the Olympic and waiting for appellant, she went to the Earl Hotel where she registered and took a room (R. 102). Appellant met her at this hotel and told her, according to Mrs. Elliot's testimony, that he was going to put her in a joint (R. 49). After spending the night together, the following morning according to Mrs. Elliot's testimony again, appellant told her that by a joint he meant a house of prostitution (R. 50). This was categorically denied by appellant (R. 234, 239). Mrs. Elliot testified that she couldn't consider this suggestion and would have to leave immediately and further that appellant then changed and said "Oh forget about it" (R. 51).

The following afternoon appellant, one Tex Reed and Mrs. Elliot drove to Yakima picking up Mrs. Reed at Cle Elum. Mrs. Elliot stayed in the Commercial Hotel that night and the next day appellant took her to the Rest Haven Motel where again the subject of her going into a house of prostitution was discussed according to Mrs. Elliot but denied by appellant (R. 239). After staying together over night at the Rest Haven Motel, they returned to Seattle with R. A. Sullivan, a business associate of appellant's, and

Mrs. Elliot was registered at the Wilhard Hotel (R. 248). Appellant stayed at the Caledonia Hotel (R. 56). They parted company shortly thereafter, appellant returning to Yakima and Mrs. Elliot returning to Chicago. Appellant testified (R. 238) that when he left Mrs. Elliot in Seattle, as they were parting, she said she was going to get even with him in one way or another.

In addition to the above facts, the testimony of John W. Worsham (R. 132) a Federal Bureau of Investigation agent, was elicited by the Government covering a conversation between the witness and appellant. This testimony was admitted over appellant's objection that the alleged admissions were secured prior to appellant's appearance before a United States Court Commissioner and formal charging (R. 133). At the meeting which was on March 6, 1950, in addition to appellant and Mr. Worsham, there was present Special Agent Eugene P. Clark of the F. B. I. Concerning the first trip out to Yakima of Mrs. Elliot, the testimony of the alleged conversation is not materially at variance with the facts heretofore set forth. With reference to the second trip, the witness stated that on the way from Seattle to Yakima, appellant, Chamales. stated that Mrs. Reed was picked up in Cle Elum, Washington at a house of prostitution. This was categorically denied as not the fact by the appellant (R. 245) as he stated that she was picked up at a restaurant in Cle Elum.

The testimony of Betty DesCorreau (R. 163) another

Government witness covered certain conversations between witness and the appellant upon occasions when she was out on some dates with appellant the two days prior to Mrs. Elliot's arriving by plane on August 14, 1949. The appellant, according to this witness stated that he was a pimp, that he had a few girls working for him, that a girl was coming in from California to work for him. Also that pimps treat these women nice before they break them into the rackets. That two or three days after the Sunday appellant stated the girl was coming in from California, he drove up to her apartment and told her he couldn't take her to Yakima as he had promised. That the girl from California was with Tex Reed and appellant and they had to go to Yakima. The witness further testified that the girl in the car was Elaine Elliot. Appellant categorically denied the alleged conversations (R. 240). Upon appellant's direct examination appellant further stated that Miss DesCorreau attempted to borrow \$100.00 from him during the latter part of August or the first part of September, 1949 but that he would not loan her the money. Miss DesCorreau then wrote him a note (R. 243) which in substance state "I thought you were a pretty nice guy until you wouldn't lend me the money and now I don't think so any more and I am going to do whatever I can to degrade you and get even with you for not giving me the money." Miss DesCorreau on cross examination (R. 185) admitted asking appellant for a loan and further that he did not give it to her. She also admitted writing a note (R. 186) but stated that it contained

a rebuke to appellant for not keeping his promises and that she was further not going to keep quiet about what she knew as far as telling her Yakima friends was concerned.

In addition to the evidentiary questions involved in the admission of the testimony of the witness, Worsham, concerning appellant's admissions and the excluding of testimony offered by the appellant as to his need for psychiatric and other medical treatment heretofore discussed on page 4 and 9 of this brief, several questions with reference to the rejection of certain testimony in the cross examination of Elaine Elliot arise. These concern the court's refusal to permit the use of identifications 5, 6 and 7 for the purpose of showing the state of love the witness, Elaine Elliot, professed to be in with reference to her brother-in-law, Bobbie Elliot, a few months before she met the appellant (R. 109, 110, 111, 112); also that the court in said cross examination refused to receive in evidence appellant's identifications 5, 6, 7, 9 and 10 for the purpose of affecting the credibility of Elaine Elliot and also showing her moral delinquency (R. 117) also the rejection of appellant's identifications 5, 6, and 7 which would show that the witness, Eliane Elliot, whose credibility was under attack, lied under oath in her previous divorce proceeding with reference to the nature of a trip taken with her brother-in-law, Bobbie Elliot (R. 115).

In the cross examination of the appellant by the United

States attorney, the court, over appellant's objection, permitted inquiry into the identity of one Tex Reed (R. 252, 253), it being the position of the appellant that this was entirely a collateral matter and had nothing whatsoever to do with guilt or innocence of appellant but was, in effect, an attempt to use a technique of "guilt by association."

The general questions of error in denying appellant's motion for acquittal both at the close of the Government's case and the closing of all the evidence, error in not instructing the jury as proposed, and error in permitting the United States attorney to read the testimony of a Government witness, Betty DesCorreanu, in his argument to the jury, (R. 256) were raised by the appellant at the proper times throughout the trial and will be more fully discussed hereafter.

SPECIFICATION OF ERRORS

The District Court erred:

1. In denying appellant's motions for judgment of acquittal made at the close of the evidence offered by the Government (R. 190).

2. In denying appellant's motion for acquittal made at the close of all the evidence (R. 254).

3. In unduly restricting the cross examination of Elaine Elliot in the following particulars:

- (a) Appellant should have been permitted to use

identifications 5, 6, and 7 being letters written by the witness, Elaine Elliot, for the purpose of proving that said witness was, a few months before meeting the appellant, Thomas T. Chamales, Jr., in such a state of love with her then brother-in-law, Bobbie Elliot, that her testimony that she was in love with the appellant at first sight was false (R. 109, 110, 111, 112), the substance of said identifications is as follows: Identification 5 is a letter from Mrs. Elaine Elliot to Mr. and Mrs. A. J. Ollendorf, her grandparents, with envelope dated September 5, 1948 post marked Chicago. Illinois in which letter Mrs. Elliot discusses how everyone misunderstands her and how overwhelming her intensity of feeling is for her brother-in-law, Bobbie Elliot, and how she hopes that he will take her with him wherever he goes. Identification 6 is a letter from Mrs. Elaine Elliot to her mother-in-law, Mrs. J. W. Eskridge, dated September 16, 1948 and post marked Tulsa, Oklahoma on the envelope, in which she again told of her great love for Bobbie Elliot and how she left Chicago with him. Identification 7 is a letter from Mrs. Elaine Elliot to Mrs. A. M. Kimbrough, her former husband's aunt dated October 7, 1948 and post marked Pine Bluff, Arkansas in which, among other things, Mrs. Elliot discusses the fact that she and Bobbie Elliot are having a tough time financially. That he is going to help her get a divorce so that they can get married and "live like decent people once more."

(b) That identifications 5, 6, 7, 9 and 10 should have been admitted for the purpose of effecting or testing the

credibility of the witness, Elaine Elliot, and for the purpose of showing moral delinquency upon the part of Elaine Elliot affecting her credibility (R. 114, 115, 116, 117). Identification 9 is a registration at the Sycamore Court at Little Rock, Arkansas under date of October 19, 1948 during a trip made by the witness, Elaine Elliot, and Bobbie Elliot, the registration being in the name of "Mr. and Mrs. B. Elliot." Identification 10 is a guest registration dated September 15, 1948 during the said trip in question taken by the witness, Elaine Elliot and Bobbie Elliot from the Anchor Court in Laurel, Mississippi, the registration being as follows: Mr. and Mrs. R. Elliot.

(c) Appellant should have been permitted to introduce identifications 5, 6, and 7 above discussed and also permitted in connection therewith to show in the cross examination of the witness, Elaine Elliot, that the said Elaine Elliot had lied under oath in her previous divorce proceeding in Chicago between herself and Wright Elliot. In this divorce proceeding, in which the custody of Mrs. Elliot's child was an issue, she swore under oath in her divorce pleadings that a trip she took in the early fall of 1949 with her brother-in-law, Bobbie Elliot, was all a conspiracy between her husband, Wright Elliot, and her brother-in-law to discredit her under circumstances that might indicate adultery and that on the trip she conducted herself in a respectable manner. Identifications 5, 6 and 7 above summarized prove that the witness, Elaine Elliot, was lying in the statements made in her verified divorce pleadings as

these letters written by the witness clearly indicate that she was madly in love with Bobbie Elliot and there was obviously no conspiracy involved and that they were obviously living together (R. 115, 116).

4. In permitting the United States attorney in cross examination of the appellant to ask and to require the appellant to answer questions as to the identity of the witness, Tex Reed (R. 252, 253). In this testimony the United States attorney asked the appellant whether or not he told Worsham of the F. B. I. that Tex Reed was a high class gambler and pimp. This evidence obviously concerned a collateral matter concerning the identity of Tex Reed and in effect was an attempt to cast discredit upon the appellant by the device of "guilt by association."

5. In permitting the witness, Worsham, to testify over appellant's objections as to admissions claimed to have been made by the appellant (R 133). These admissions arose out of a conference on March 6, 1950 when appellant was taken to the F. B. I. Office in Yakima and interrogated by the witness, Worsham, and Eugene P. Clark, also a special agent of the F. B. I. concerning his acquaintanceship with Mrs. Elliot. The admitted testimony briefly summarized the appellant's travel from Chicago to Yakima, Washington in the same compartment with Mrs. Elliot on the Northern Pacific Railroad, her stay at the Commercial Hotel for three weeks, the fact that they had sexual relations during the said period, the appellant's sending her back to Chicago

in the spring of 1949, the phone calls, made by Mrs. Elliot to the appellant, her second trip out to the Northwest using money that he sent her, the trip from Seattle to Yakima and their being together at the Rest Haven Motel in Yakima, the appellant's registration of Mrs. Elliot at the Wilhard Hotel in Seattle under the name of Elaine Palmer. It is appellant's contention that this testimony was not admissible due to the fact that appellant had not been charged with an offense or appeared before a United States Court Commissioner at the time of the alleged admissions.

6. In excluding the testimony offered by the appellant as to his need of psychiatric and other medical treatment and as to the history of the medical and psychiatric treatment received by the appellant subsequent to his discharge from military service and up to the date of the trial (R. 218, 219, 220). The offered testimony would have shown the appellant's emotional instability during the time the alleged crime was committed and should have been before the jury to assist them in the determination of appellant's guilt or innocence.

7. In refusing to submit appellant's proposed instructions No. 9, 11 and 16 (R. 5, 6, and 7). The refused instructions are as follows:

"Proposed Instruction No. 9

You are instructed that even though you find from the evidence beyond a reasonable doubt that the defendant Thomas T. Chamales, Jr., had the intention that he would put the woman Elaine Elliot in the business of prostitution or

have immoral sexual relations with her or allow or arrange for someone else to have immoral sexual relations with her but that he did not form such intention until reaching the State of Washington, then you must return a verdict of 'Not Guilty'."

The above instruction should have been given for the reason that from the testimony the jury could well have found that even though the appellant was guilty of an intention to place Mrs. Elliot in a house of prostitution that such intention was not formed until after her arrival in the State of Washington (R. 277).

"Proposed Instruction No. 11

You are instructed that in order for you to find that the intent of the defendant, Thomas T. Chamales, Jr., was for himself to have immoral sexual relations with the woman, Elaine Elliot, you must find from the evidence beyond any reasonable doubt that the defendant formed a plan in his mind to have such immoral sexual relations at the time he transported or caused to be transported this woman across state lines, if you find that he did so transport or cause her to be transported, and you must find that it was his actual plan, seriously made as distinguished from a mere hope or desire or mere wishful thinking that such immoral relations could be accomplished if the woman was across the state border, and if you find that the defendant's intent was a mere hope or desire or anything less than an actual, seriously made plan to have immoral sexual relations with the woman, Elaine Elliot, then you must return a verdict of 'Not Guilty'."

The above instruction should have been given because it explains to the jury the necessity that the appellant have a planned intent at the time the alleged transportation was begun. The statute under which the appellant was charged provides specifically that the transportation be performed

for the purposes mentioned in the statute, and if the jury found that the transportation was not under a plan for that purpose the appellant should be found not guilty even though the jury might find that the appellant had a wish or desire or some wishful thinking about immoral relations. This instruction is just as applicable to the second count because there was evidence in the second count as to sexual relations after Mrs. Elliot reached Seattle, Washington on her second trip (R. 279).

“Proposed Instruction No. 16

You are instructed that if you find from the evidence presented to you during this trial that the defendant transported or caused to be transported the woman Elaine Elliot but that he did so with the intent that he was to employ her in his hotel, with which he was connected in a legitimate and honest position, then you must return a verdict of ‘Not Guilty.’ Or if you find that the defendant’s intent was some other lawful purpose, then you must also return a verdict of ‘Not Guilty.’ Or even though you find beyond a reasonable doubt that the defendant intended that the transportation of Elaine Elliot was for immoral purposes but that such intent, if any, was secondary or a lesser intention or intentions and that some lawful or legitimate purpose was the defendant’s main or primary purpose, then you must also return a verdict of ‘Not Guilty.’”

This instruction should have been given for the reason that it covers the point that if the jury found the transportation of Mrs. Elliot was with the intention that she was to be employed or that the appellant’s intention was to “tell her off” to her face so that she would leave him alone in the future, in neither event would the appellant have been guilty of the crime charged in the second count. Without

this instruction having been given, this phase of the case was not properly before the jury (R. 279).

8. In refusing to admit appellant's identifications numbers 2, 3, and 8 which identifications were the pleadings of the witness, Elaine Elliot's divorce proceedings and showed her sworn statements therein relating to the alleged conspiracy between her husband, Wright Elliot, and Bobbie Elliot concerning her trip with the said Bobbie Elliot and also her sworn statement that she conducted herself as a respectable woman on said trip.

9. In permitting the United States Attorney in his closing argument to the jury to read in question and answer form the testimony of the Government witness, Betty DesCorreau (R. 256, 257, 258), it being appellant's contention that this in effect permitted the witness, Betty DesCorerau, to testify twice and unduly emphasized said witness' testimony and such action on the part of the United States attorney was highly prejudicial to the appellant.

10. In denying defendant's motion for a new trial.

ARGUMENT OF THE CASE

SUMMARY

1. The court erred in denying appellant's motion for an acquittal at the close of the Government's case and at the close of all the evidence due to the insufficiency of the evidence presented.

2. The cross examination of Mrs. Elaine Elliot was

unduly restricted and such restriction was prejudicial to the appellant's defense preventing a thorough testing of the credibility of this witness which was a key point in the case. The refusal to admit identifications 2, 3, 5, 6, 7, 8, 9 and 10 augmented this prejudice.

3. The cross examination of Appellant as to the identity of one Tex Reed, the said Reed being not even called as a witness in the case, also was prejudicial to the appellant.

4. It was error to admit the alleged admissions of the appellant through the testimony of the witness, Worsham.

5. It was error to reject the appellant's testimony as to his need of psychiatric and other medical treatment.

6. The court erred in refusing to charge the jury as set forth in appellant's requested instructions 9, 11 and 16.

7. The use of the testimony of the witness, Betty DesCorreau, in question and answer form by the United States attorney in his closing argument to the jury unduly emphasized this testimony to the appellant's prejudice.

8. A new trial should have been granted by the trial court.

I.

APPELLANT'S MOTION FOR ACQUITTAL SHOULD HAVE BEEN GRANTED

It is appellant's contention that there was no testimony whatsoever in the case proving a plan to be participated in

or acted upon jointly by the appellant and Mrs. Elliot to violate the statute in question. Likewise, there is no credible evidence which would prove or tend to prove that the appellant had any plan from which the jury could infer an intent to violate the statute at least prior to Mrs. Elliot's entering the State of Washington. Her testimony as to both trips was that she was coming out to work. Appellant's testimony as to the first trip certainly indicates that he had in mind her working at the hotel (R. 226). His testimony as to the purpose of the second trip was to the effect that he wished to explain personally to her that the affair between them was finished and that she had to stop pursuing him (R. 232).

The primary evidence brought forth by the Government to establish appellant's intent was by the witness, Betty DesCorreau. It is submitted that her testimony was obviously so biased and so fantastic that it was not worthy of belief. The statements that she attributes to the appellant (R. 163) are absolutely uncorroborated although her testimony of the appellant stopping at the witness' apartment, and allowing her to see the woman in the car whom she identified at the trial as Mrs. Elliot (R. 171), could have been easily corroborated. It is difficult to understand why the matter of this stop was not corroborated in the direct examination of Mrs. Elliot, because a mere reading of her testimony evidences a most remarkable memory, particularly on her direct examination of names, dates, places and what happened. It would seem that if the stop on the way

from Seattle to Yakima in front of Miss DesCorreau's apartment was actually made, that Mrs. Elliot would have remembered the stop.

It is likewise impossible to understand why the witness, Carlyle (Tex) Reed who was under subpoena by the Government and present at the trial (R. 22) and who was the only other person with testimonial knowledge concerning the alleged stop, was not interrogated upon the government's case-in-chief as to this point. The failure of these witnesses to corroborate Miss DesCorreau's testimony, linking up Mrs. Elliot to the previous conversations she had with the appellant, leads only to one conclusion, namely that they could not corroborate Miss DesCorreau's statement because the stop simply was not made. This testimony was obviously manufactured for the purpose of "getting even" with the appellant.

The vital necessity of proving beyond a reasonable doubt the intention of transporting a woman for a purpose outlawed by the statute has been enunciated many times by our courts. The failure to prove by the degree of required proof, this intent, is our principal contention on this point.

In *MORTENSEN vs. U. S.*, 88 LAW ED. 1331; 322 U. S. 369, our Supreme Court held that a conviction of the crime of knowingly transporting women in interstate commerce for immoral purposes and with the intent and purpose to induce, entice or compel a woman so transported to become a

prostitute is not violated by evidence that defendants, a man and wife who operated a house of prostitution, were accompanied by two of the prostitutes on a pleasure trip across state lines and that upon their return to the house of prostitution, such prostitutes resumed the exercise of their vocation. The court in discussing the matter of intent stated:

“An intention that the women or girls shall engage in the conduct outlawed by § 2 must be found to exist before the conclusion of the interstate journey and must be the dominant motive of such interstate movement. And the transportation must be designed to bring about such result. Without that necessary intention and motivation, immoral conduct during or following the journey is insufficient to subject the transporter to the penalties of the Act.”

In *YODER vs. U. S.* 80 FED. (2d) 665 (CCA 10) it was held that, under the statute making it an offense to transport a female in interstate commerce for immoral purposes, the prospect of sexual relations must have some relation to and be one of the reasons or purposes of the trip, but if the sole purpose of the trip is legitimate, purely incidental intent to have intercourse is not a federal offense. In discussing this point, the court stated at page 672:

“While ‘intent and purpose’ are used synonymously in the second clause of this statute, and many courts have so used them in these cases, yet the authorities cited all hold, as we do, that the prospect of sexual relations must have some relation to, and be one of the reasons or purposes of the trip. There may, of course, be two or more reasons or purposes for one trip, *Carey v. United States* (CCA 8) 265 F. 515, but if the sole purpose of

the trip is legitimate, a purely incidental intent to have intercourse is not a federal offense. If the jury believed the witnesses for the defendant here, there was no crime. And their testimony is strongly buttressed by the admitted fact that there was no necessity to go to Chicago, or anywhere else, for an immoral purpose."

In *U. S. vs. GRACE*, 73 Fed. (2d) 294 (CCA 2) it was held that if the interstate journey was planned with no immoral purpose at the time, no crime was committed since immoral relations standing alone unconnected with interstate commerce do not violate the statute. The court stated at page 295:

"The statute makes the intent and purpose an element of the crime, and, if the journey was planned with no immoral purpose at the time, no crime was committed no matter what may have occurred thereafter. It is the immoral purpose which renders such interstate commerce criminal. The immoral relationship, standing alone, unconnected with interstate commerce, does not violate the act. *Drossos v. United States* (CCA) 16 F. (2d) 833; *Sloan v. United States* (CCA) 287 F. 91; *Fisher v. United States* (CCA) 266 F. 667; *Gillette v. United States* (CCA) 236 F. 215. Inducing a girl to go from one state to another with any other purpose, except the formed intent at the outset, is insufficient to constitute a violation of the statute. *Alpert v. United States*, supra; *Welsch v. United States* (CCA) 220 F. 764; *Sloan v. United States*, supra."

In *ALPERT vs. U. S.* 12 F. (2d) 352 (CCA 2) it was held that intent is essential to violation of the White Slave Traffic Act of June 25, 1910 and the fact that the journey in question from one state to another is followed by illicit intercourse does not result in a violation of that Act where the journey was made for wholly different reasons. In

discussing the matter of intent the court stated at page 354:

“There is no evidence of any arrangement between the couple or understanding between them for illicit intercourse after going to Pennsylvania. The fact that a journey from one state to another is followed by such intercourse, where the journey was not for that purpose, but wholly for other reasons, cannot be regarded as a violation of that act. *United States v. Fisher* (CCA) 266 F. 670. To justify conviction, there should be convincing evidence of the intention to transport the woman for immoral purposes, and that it was formed before the woman reached the state to which she was being transported. If the intention referred to did not exist before the woman reached the state to which she was being transported, but was formed after reaching the state in which the illicit relationship is had, conviction under the act cannot be had.”

In *JOHNSON v. U. S.* 215 Fed. 679 (CCA 7) it was held that although the evidence was sufficient to sustain a conviction of the accused for causing a woman to be transported in interstate commerce for the purpose of having sexual intercourse with her, it was, however, insufficient to sustain counts for causing the same woman to be transported for purposes of prostitution. The facts in this case indicated that the defendant had supplied money to allow the woman to open and conduct a brothel in Chicago after having paid her transportation to Chicago from Pittsburgh. In discussing the intent shown in view of the proof the court stated at page 682:

“But a different situation affects the prostitution counts. Telephone and telegraph messages contained no suggestion of prostitution. The only fact is that several days after the girl’s arrival in Chicago defendant supplied

the money to enable her to open and conduct a brothel. This fact might lead to a suspicion that defendant when providing transportation had the intent to aid her subsequently in her profession. But criminal convictions cannot be allowed to rest on suspicion. And there were no supplementary facts like those that support the sexual intercourse counts—no proof that defendant had ever been connected with or interested in brothels, or that prior to the act in Chicago he had ever aided this or any other girl to engage in prostitution.”

It is submitted that the Johnson case is certainly much stronger than the case at bar as we have no credible evidence in the instant case that the appellant was connected with or interested in brothels. There is also nothing in the evidence relating to the second count which would indicate any planned intent or purpose upon the part of the appellant that he was bringing Mrs. Elliot out from Chicago to Seattle for the purpose of having sexual relations with her. The fact that he did have sexual relations after she reached Seattle, we submit is and was purely incidental to the main purpose of the trip which as we have heretofore stated, was to convince her that she and the appellant were through.

In *FISHER vs. U. S.* 266 F. 667 (CCA 4) the court stated at page 670:

“That is to say, the interstate transports denounced by the act must have for its object, or by a means of effecting or at least of facilitating, the sexual intercourse of the parties. But the mere fact that a journey from one state to another is followed by such intercourse, when the journey was not for that purpose, but wholly for other reasons, to which intercourse was

not related, cannot be regarded as a violation of the statute."

II.

THE CROSS EXAMINATION OF MRS. ELLIOT WAS PREJUDICIALLY RESTRICTED

It is appellant's contention that the cross examination of the Government's principal witness, Mrs. Elaine Elliot was unduly restricted and that such restriction was prejudicial and prevented the appellant from having a fair trial. The entire case actually hinged upon the credibility of the two principals involved in these transactions, namely, Mrs. Elaine Elliot, the prosecuting witness, and the appellant, Tom Chamales, Jr. The casting of the strong light of a searching cross examination upon Mrs. Elliot's testimony was prevented and the jury was not enabled to view her testimony in its proper perspective having been tested by this fundamental right of every accused. The restriction of the cross examination of Mrs. Elliot denied to the appellant a substantial right and withdrew one of the very fundamental safeguards essential to a fair trial. Her credibility was not tested and without such a test the jury could not fairly appraise the weight of her testimony.

It is appellant's contention that in view of Mrs. Elliot's statement that she fell in love with the appellant at first sight (R. 37, 66) that he should have been allowed upon the cross examination of this witness to interrogate her at length regarding an extended affair she had with one Bobbie

Elliot in the fall of 1948 and approximately five to six months prior to her meeting the appellant. The purpose of this phase of the cross examination was to place before the jury the fact that this woman had only a few short months ago professed great love for one Bobbie Elliot, her then husband's brother, had taken a cross-country trip with him, unlawfully cohabiting with him in various auto courts in Arkansas and Mississippi, particularly, and it was thus at least doubtful that her statement that she fell in love with the appellant at first sight was actually the truth. Appellant had the right to raise this point, it is submitted, by offering in evidence identifications 5, 6 and 7, being the letters written by the witness professing her great love for Bobbie Elliot and her intensity of feeling for him, and also examining the witness concerning the contents of these letters. This point would certainly tend to rebut Mrs. Elliot's testimony given in her direct examination. The identifications 9 and 10 being the motel registration of Mr. and Mrs. Bobbie Elliot, in the case of identification 9, at the Sycamore Court, Little Rock, Arkansas and the registry of Mr. and Mrs. R. Elliot at the Anchor Court in Laurel, Mississippi, were, of course, also material and relevant upon this point tending to prove her extreme state of love for Bobbie Elliot. The offer of proof upon these points and the offer of the identifications in evidence was made at the proper time (R. 11, 112, 114).

Another phase of the undue restriction of the cross examination of the witness was the refusal of the court to

permit the cross examination of the witness, Mrs. Elliot and the introduction of the identifications 5, 6, 7, 9 and 10 which would very clearly have shown the moral delinquency of the witness in view of the fact of her unlawful cohabitation with Bobbie Elliot and the jury was entitled to consider her evidence in view of this moral delinquency which was clearly subject to being proven. The background of every witness is subject to searching, particularly for moral delinquency, in order that the jury may properly assess the credibility of the witness and properly weigh the testimony in question.

The cross examination of this witness was further unduly restricted by reason of the trial court's refusal to allow the appellant to question her concerning obvious false statements sworn to in her divorce pleadings. Identifications 2, 3 and 8 contained the entire pleadings in Mrs. Elliot's divorce case with her husband, Wright Elliot, and in her counter complaint, being identification 8, this witness swore under oath that while in the company of Bobbie Elliot she conducted herself in a respectable manner and that her trip, above discussed, with Bobbie Elliot was all a conspiracy upon the part of her husband, Wright Elliot and the said brother-in-law, Bobbie Elliot in order to manufacture adultery charges. The identifications 5, 6 and 7 heretofore discussed were letters written by the witness, Mrs. Elliot, to her grandparents, Mr. and Mrs. A. J. Ollendorf, her mother, Mrs. J. W. Eskridge, and to a Mrs. A. M. Kimbrough. These letters indicate beyond a doubt that Mrs.

Elliot and Bobbie Elliot were not conducting themselves in a respectable manner and in identification 7, she makes the statement that Bobbie Elliot was going to help her get a divorce so that they could get married and "live like decent people once more." If the appellant had been permitted to cross examine this witness upon her sworn statements in the divorce counter-suit and the statements contained in her letters, it is entirely possible that the witness would have admitted the fact that she swore to the statement in the divorce counter-suit and also wrote the matter contained in the letters in question. The jury would then have had before them an admission that Mrs. Elliot had previously sworn falsely and her testimony in the case at bar would have been weighed by the jury with this fact in mind. As the matter now stands, the appellant was refused the right to even go into this false swearing. The offer of this testimony and identifications was properly made (R. 115, 116, 117 and 118).

In TLA-KOO-YEL-LEE vs. U. S. 42 Law. Ed. 166, 167 U. S. 274, it was held that a woman who has testified for the prosecution to the fact that a murder was committed by the defendant and by her husband, who was also indicted therefor, may be asked on cross examination whether since her husband's arrest she has not been living with another witness for the prosecution, and whether they had not agreed to live together if the husband is convicted and they get clear. Specifically, the question asked in this case referred to who the witness was living with and whether or

not since her husband was arrested she had not been living with another witness in the case. Upon objection by counsel for the prosecution, the evidence was not admitted. The Supreme Court in reversing the conviction because of the error in refusing to allow the questions to be asked stated:

“We think answers to all of these questions should have been permitted. *The questions were directed to the purpose of showing material facts bearing upon the character and credibility of the witness, and the counsel for the defendant ought to have been permitted to proceed with his examination and obtain answers from the witness to that end.*”

In ALFORD vs. U. S. 75 Law Ed. 624, 282 U. S. 687, it was held that a witness for the prosecution who has testified to uncorroborated conversations of defendant of a damaging character, may properly be asked on cross examination, “Where do you live?”, even though the purpose of the inquiry is to point out the fact that he is in court in the custody of the federal authorities, as such circumstance has a bearing on the question of bias; further that the denial of reasonable latitude in cross examination is prejudicial error; and it is not necessary to show that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief. In reversing the conviction, our supreme court stated:

“Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply. KNAPP v. WING, 72 Vt. 334, 340, 47 Atl. 1075; *Martin v. Elden*, 32 Ohio St. 282,

289. It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. *Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them.* TLA-KOO-YEL-LEE v. UNITED STATES, 167 U. S. 274, 42 L. ed. 166, 17 S. Ct. 855, supra; KING v. UNITED STATES, 50 (CCA) 647, 112 Fed. 988, supra; PEOPLE v. MOORE, 96 App. Div. 56, 89 N. Y. Supp. 83, affirmed without opinion in 181 N. Y. 524, 72 N. E. 1129; cf. PEOPLE v. BECKER, 210 N. Y. 274, 104 N. E. 396. To say what prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial. . .

The extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court. It may exercise a reasonable judgment in determining when the subject is exhausted. (citing cases).

But no obligation is imposed on the court, such as that suggested below, to protect a witness from being discredited on cross-examination short of an attempted invasion of his constitutional protection from self-incrimination, properly invoked. There is a duty to protect him from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him. THIRD GREAT WESTERN TURNP. ROAD CO. v. LOOMIS, 32 N. Y. 127, 132, 88 Am. Dec. 311; WALLACE v. STATE, 41 Fla. 547, 574ff., 26 So. 713, supra; 5 Jones, Ev. 2d ed. Sec. 2316. But no such case is presented here. The trial court cut off in limine all inquiry on a subject with respect to which the defense was entitled to a reasonable cross-examination. This was an abuse of discretion and prejudicial error."

In *PULLMAN COMPANY v. HALL*, 55 Fed. (2d) 139 (CCA 4) it was held that for the purpose of impeaching credibility, a witness may be questioned as to misconduct respecting collateral matters which has a tendency to show lack of honesty or truthfulness, but the party questioning is bound by the answers. In discussing this point, the court stated:

“We come then to the third question. Plaintiff testified as a witness in her own behalf; and on her cross-examination counsel for defendant proposed to question her as to her having sworn falsely in the affidavit filed as a basis for proceeding in forma pauperis. Upon objection of plaintiff’s counsel, these questions were excluded. In this there was error. The proposed questions related to a matter connected with the very case on trial which undoubtedly affected plaintiff’s credibility as a witness. *The matter as to which inquiry was proposed was collateral to the issue on trial, and for that reason extrinsic evidence would not have been competent to establish it or to contradict plaintiff’s testimony with regard thereto, but it was competent, on cross-examination of plaintiff, to question her with regard to it. The rule is that for the purpose of impeaching the credibility of a witness he may be questioned as to misconduct, even as to collateral matters, which has a tendency to show his lack of honesty or truthfulness; the qualification of the rule being that the party questioning him is bound by his answers and may not contradict him with regard thereto. See Wigmore on Evidence (2d Ed.) vol. 2, Sec. 982 et seq.; Greenleaf on Evidence, Lewis’ edition, Sec. 459; 28 R. C. L. 607; TLA-KOO-YEL-LEE v. U. S., 167 U. S. 274, 277, 17 S. Ct. 855, 42 L. Ed. 166. It is said that it was within the discretion of the trial judge whether questions would be permitted as to acts of misconduct affecting credibility. We think, however, that the matter resting within the discretion of the judge is merely the extent to which such examination may be pursued. To refuse*

the right to examine at all with respect to such matters is reversible error. TLA-KOO-YEL-LEE v. U. S., *supra*; ALFORD v. U. S., 282 U. S. 687, 694, 51 S. Ct. 218, 75 L. Ed. 624; 28 R. C. L. 609.

For the reasons stated, the judgment below will be reversed, and the cause will be remanded for a new trial."

In SIMON v. U. S. 123 Fed. (2d) 80 (CCA 4), it was held that in criminal cases in federal courts, credibility of a defendant who has testified may be impeached in the same manner and to the same extent as any other witness, but no further, and cross-examination for impeachment should be confined to acts or conduct which reflect upon his integrity or truthfulness, or so pertain to his personal turpitude, as to indicate moral depravity or degeneracy that would likely render him insensible to the obligations of oath. In discussing this point, the court stated:

"... questions asked on cross-examination for the purposes of impeachment should be confined to acts or conduct which reflect upon his integrity or truthfulness, or so 'pertain to his personal turpitude, such as to indicate such moral depravity or degeneracy on his part as would likely render him insensible to the obligations of an oath to speak the truth' (citing case); when such a question is asked and answered, the inquiry is ended; the government is bound by the answer in that it may not, on rebuttal, offer countervailing proof (citing cases)."

In CHRISTOPOULO v. U. S. 230 Fed. 788 (CCA 4), it was held that in the prosecution for falsely representing himself to be a citizen of the United States, defendant, who took the stand in his own behalf may be required to answer whether he ran a "blind tiger" when the court charges that

his answer can be considered, not as evidence of guilt, but only as affecting, in so far as it involved moral delinquency, his credibility as a witness. The court stated at page 791:

“The only remaining assignment that needs to be noticed relates to a question of evidence. The defendant was a witness in his own behalf and was asked on cross-examination if he ran a “blind tiger” which implied that he sold liquor unlawfully. The question was allowed over his objection and he was required to answer. In charging the jury the trial court made it plain that this evidence was admitted, not as tending in any wise to prove the offense for which defendant was on trial, but solely, in so far as it involved moral delinquency, as affecting his credibility. For this purpose, to which it was explicitly limited, the evidence was admissible, as this court had recently held in *FIELDS v. UNITED STATES*, 221 Fed. 242, 137 CCA 98.”

In *PORT WELLS MILL & LUMBER COMPANY v. CRAWFORD*, 264 Fed. 935 (CCA 9), it was held that the admission in evidence of the record in another action for the purpose of discrediting a witness was not prejudicial error even though the records in this action were made up by the party's attorney, since they were binding upon him and could be used to discredit him. The Ninth Circuit Court stated at page 938:

“The first assignment of error relates to the admission by the court, over objection of plaintiff's counsel, of certain court records in the case of *GEORGE LACY ET AL. v. H. E. ELLIS*. The record was introduced for the purpose of discrediting Ellis, who had been called by plaintiff, and was at the time under cross-examination. Ellis being a party to that case, his attention was called to a certain statement accompanying the record, and he was asked whether it was correct, and answered

that he did not believe the statement to be correct. Primarily the record did have a tendency to discredit the witness and was relevant for the purpose, and was properly admitted. Although Ellis' attorney made up the records in the case, they were nevertheless such as Ellis was responsible for, and were binding upon him, and were such as could be properly used to discredit him respecting his testimony given in his examination in chief."

In U. S. v. BUCKNER, 108 Fed. (2nd) 921, (CCA 2) it was held that cross examination of accused concerning circumstances surrounding his resignation from the bar was proper as affecting credibility, the court stating:

"We do not regard this procedure as improper. It would have been permissible, as bearing on the credibility of the witness, to ask him whether he had been disbarred. PEOPLE v. DORTHY, 156 N. Y. 237, 50 N. E. 800. Questions regarding resignation under fire, together with an admission of inability to make a successful defense against charges of professional misconduct, imply very much the same sort of immoral acts as does disbarment, and should be similarly admissible to affect credibility."

In 58 AM. JUR. 346, Witnesses Sec. 625, it is stated:

"Cross-examination with a view to direct impeachment is not the limit of the right. While it is not allowable to a counsel on cross-examination to put a question to a witness concerning any distinct collateral fact, not relevant to the issue, for the purpose of disproving the truth of the expected answer by other witnesses, a witness may be cross-examined as to irrelevant matters in order to discredit his testimony by what he himself may state in answer. In fact, this line of inquiry is the principal factor in establishing cross-examination as one of the chief agencies for the development of the truth in judicial inquiries. By means thereof the relation of

the witness to the cause of the parties, his bias or interest, if he has any, his character for truth and veracity indeed any collateral fact which may bear on his truthfulness and impartiality, may be brought to light. Any question, although irrelevant or remote, may be put if it reasonably tends to explain, contradict, or discredit any testimony given by him, or to test his accuracy, memory, veracity or credibility."

In 7 CYC. of FED. PROC. 86 Section 3131, it is stated:

"The courts have not hesitated to discredit witnesses whose unworthiness of belief is apparent by reason of their character and conduct. The manner of making it so appear is another matter. It has been the rule for a long time that the witness may be discredited by showing upon cross-examination collateral matters which detract from his character and moral principles in a manner bearing upon his worthiness to be believed. In this way the illegal character of a witness' occupation or associations may be shown as bearing on the question of this credibility, but it cannot be done except upon cross-examination of him; and, when such matters are gone into on cross-examination, the answer of the witness is conclusive and not open to rebuttal."

It is submitted that the above cases are conclusive upon the prejudicial limitation of appellant's cross examination of the witness, Mrs. Elaine Elliot.

III.

THE IDENTITY OF ONE TEX REED WAS PREJUDICIAL
THE CROSS EXAMINATION OF APPELLANT AS TO

The United States attorney in his cross examination of the appellant was permitted to ask and the appellant was required to answer over objections questions as to the identity of one Tex Reed (R. 252, 253). Reed, although

subpoenaed by the Government, was not called as a witness during the entire case. The name of Reed was mentioned only incidentally in the direct examination of the appellant and all other reference to this individual was a part of the government's case-in-chief. The only obvious purpose of the examination of appellant concerning the identity of this witness was to establish "guilt by association" as the questions asked certainly by inuendo and directly for that matter, indicated that this person was engaged in the business of prostitution. This evidence, of course, would obviously tend to create prejudice in the minds of the jury against the appellant and certainly prevented the jury from considering the evidence adduced in the case in a fair and impartial manner.

In *HOCKADAY vs. RED LINE, INC.*, 174 Fed. (2d) 154 (CCA, D. C.), it was held that cross examination of the plaintiff in a personal injury action to show that he had not served in the military forces although suspension of a sentence for assault was conditioned upon such service and reference to such fact in defense counsel's argument to the jury deprived plaintiff of a fair trial and constituted reversible error. In discussing this point, the court stated:

"Surely such a statement was not pertinent to any issue in this case, even to the question of the credibility of the plaintiff. It was designed to becloud the real issues in the case and to focus the jury's attention on something which was immaterial and which was prejudicial to the plaintiff. We are of the opinion that no useful purpose was served by exposing to the jury the fact that this plaintiff had failed to enter the armed forces

of the United States, and much harm to the plaintiff naturally followed such disclosure."

In *WILSON v. U. S.*, 4 Fed. (2d) 888 (CCA 8), it was held that although the government is not confined in cross examination of a defendant to a mere categorical reiteration of her testimony in chief, cross examination wholly outside her examination in chief, and making her give self-incriminating testimony was not permissible and was in fact, reversible error.

The questions asked the appellant on his cross examination by the United States attorney concerned no matter of proof and as stated above, merely served to prejudice the jury against the appellant.

IV.

IT WAS ERROR TO ADMIT THE TESTIMONY OF THE WITNESS, WORSHAM, CONCERNING ALLEGED ADMISSIONS OF THE APPELLANT

John W. Worsham, an agent of the Federal Bureau of Investigation, interrogated the appellant on March 6, 1950, and testified concerning certain alleged admissions made by the appellant at the time of the conversation (R. 137, 138). The appellant was not arrested until March 9, 1950, some three days after this conversation (R. 141). It does not appear in the record when the appellant was taken before a United States Commissioner but, it is, of course, obvious that it had to be after his arrest on March 9th. It is the position of the appellant that the admitting of these alleged

admissions was prejudicial error in view of the fact that they occurred prior to a hearing before the United States Court Commissioner and prior to his arrest.

Fed. Rules Cr. Proc., Rule 5, 18 U. S. C. A., provides that upon a party's arrest he shall have a hearing before a United States Commissioner without unnecessary delay. In both *McNABB v. U. S.*, 87 Law Ed. 19, 318 U. S. 332 and *ANDERSON v. U. S.*, 87 Law Ed. 829, 318, U. S. 350, it was held that confessions obtained before the defendant was taken before a United States Commissioner and which confessions were not voluntary, could not be introduced as evidence on the trial and the considerations of justice required the setting aside of convictions obtained by incriminating statements not voluntarily given.

In interpreting the *McNabb* and *Anderson* cases, it was held in *U. S. v. HAUPT*, 136 Fed. (2d) 661 (CCA 7) that statements taken from defendants by officers of the F. B. I. before defendants had been taken before a committing officer as required by the statute were inadmissible.

In *U. S. v. HOFFMAN*, 137 Fed. (2d) 416 (CCA 2), defendant was being prosecuted for failure to report for induction into the Army and statements were taken from him after his arrest but before his arraignment. It was held that even voluntary statements made by the defendant after his arrest and before arraignment were not admissible against him, the court stating:

"Next we must consider the statements given the F. B. I.

Defendant was arrested by F. B. I. agents on December 23 and taken to the Federal Building in Brooklyn, where he was questioned by Mr. De Meo, the government prosecutor in this case. At that time he signed a statement, witnessed by Mr. Walsh, the F. B. I. agent who testified. He gave another statement on December 24, with an addendum on December 26, both from the Federal House of Detention in New York City. Whether these were made before his arraignment is not clear. Mr. Walsh testified that immediately upon his apprehension, defendant was brought before Mr. De Meo, "and there (then?) was again questioned by Mr. De Meo, and was later arraigned" before the United States Commissioner. Whether "later" was a matter of hours or days does not appear. The facts that the Commissioner allowed his release on moderate bail and that he was still in detention when ever the later statements were given suggest that all preceded arraignment. If so, they were not admissible against him under the cases of *McNabb v. United States*, 318 U. S. 332, 63 S. Ct. 608, 87 L. Ed. , and *Anderson v. United States*, 318 U. S. 350, 63 S. Ct. 599, 87 L. Ed. , both decided March 1, 1943, and *United States vs. Haupt et al.*, 7 Cir., 136 F. (2d) 661, decided June 29, 1943. These cases appear to make it clear that even the voluntary character of statements prior to arraignment does not make them admissible. See Proposed Federal Rules of Criminal Procedure, Rule 5, and Committee Note thereto."

V.

APPELLANT'S TESTIMONY AS TO HIS NEED OF PSYCHIATRIC AND OTHER MEDICAL TREATMENT SHOULD HAVE BEEN ADMITTED

In appellant's direct examination, testimony was offered as to his having taken medical and psychiatric treatment during the time of the alleged offenses which treatment was necessitated and caused by appellant's wounds

received during the war and his service in the Burma Theater. While it is not our contention that appellant was insane and the evidence offered would not have needed to prove insanity, yet it is submitted that the testimony would have thrown some light, as far as the jury was concerned, upon appellant's peculiar acts which the average person simply could not understand. The acts we specifically refer to are his going to Tacoma to send a money order to Mrs. Elliot's room mate, Marge Mahoney, and his taking a receipt in the name of Tom Chambers. Also his use of various aliases in registering both himself and Mrs. Elliot at various hotels and auto courts. This evidence of his warped state of mind it is submitted also is important generally for the jury's consideration as to whether or not appellant had formed an intent, plan or purpose to violate the act in question prior to Mrs. Elliot's arrival in the State of Washington.

In 22 C. J. S. 933 it is stated in Section 613 under "Inclination or Intent to Commit," that:

"... when it becomes material to show the particular intent which inspired an act, any fact or circumstance which proves or tends to prove such intent, or which proves or tends to prove want of such intent is admissible."

In *NARCOTT v. U. S.*, 65 Fed. (2d) 913, (CAA 7), defendant was indicted being charged with using the mails in executing a fraudulent scheme to sell securities. It was held that circumstantial evidence which reasonably throws

light upon defendant's intention either directly or indirectly, is admissible in prosecution for using mails to defraud. In this connection, the court stated:

"The intention of the appellants is a most vital element in this cause. They are the only ones who have absolute knowledge concerning that subject. Their evidence, of course, is to be weighed as other evidence, but on account of their intense interest their statements as to their intention are to be considered with great caution. For this reason circumstantial evidence, as in all such cases, must play an important part in the determination of that fact, and all circumstances which reasonably throw light upon that subject, either directly or indirectly, should be received in evidence on behalf of both the Government and those charged with crime. See *Wood vs. United States*, 16 Pet. (41 U. S.) 342, 10 L. Ed. 987. Such evidence is not only quite important to the jury in the determination of guilt, but it is equally important to the court in the imposition of penalty."

See also *PEOPLE vs. MOONEY*, 171 Pac. 690 (Cal.).

VI.

THE COURT ERRED IN REFUSING TO GIVE APPELLANT'S REQUESTED INSTRUCTIONS

9, 11 AND 16

Appellant's requested instruction number 9 would have instructed the jury upon the necessity of their determining that appellant had formed the necessary intent to violate the statute prior to Mrs. Elliot's reaching the State of Washington. This particular point was not covered in the court's instructions as the only instruction concerning intent with reference to the transportation was as follows:

"An intention that the woman shall engage in the con-

duct outlawed must be found to exist at the time the transportation took place, and must be the dominant motive of such interstate movements . . .” (R. 263).

The proposed instruction in essence followed the language of the United States Supreme Court in *MORTENSON v. U. S.*, 88 L. Ed. 1331, 322 U. S. 369, cited *supra*, and we again quote the court’s language upon the time of formation of the intent:

“An intention that the woman or girl shall engage in the conduct outlawed by Section 2 must be found to exist before the conclusion of the interstate journey . . .”

While it is true the court’s instruction generally followed the *Mortenson* case upon this very important point, it was not specifically stated that the intention must be found to exist before the conclusion of the journey but merely that the intention must be found to exist at the time the transportation took place.

In *ALPERT v. U. S.*, 12 Fed. (2d) 352 (CCA 2), cited *supra*, the court stated and we again quote:

“To justify conviction, there should be evidence of the intention to transport the woman for immoral purposes, and that it was formed before the woman reached the state to which she was being transported.”

In *SLOAN v. U. S.*, 287 Fed. 91 (CCA 8), it was stated:

“Therefore, in order to constitute the offense charged, there must be substantial evidence that the intention to transport the woman for immoral purposes must have been formed by the parties before they reached the foreign state, to which the woman is being transported. If it did not exist then, but was only formed

after reaching the state in which the immorality is committed, it is clearly insufficient to warrant a conviction under the act."

From the above citations, it is submitted that the court did not properly charge the jury upon the time of the formation of the intent and the jury could have determined that the intent was formed while the transportation was taking place and Mrs. Elliot was actually traveling within the boundaries of the State of Washington.

Proposed instruction number 11 placed before the jury the fact that a mere expectation upon the part of the appellant that he would perhaps have immoral relations with Mrs. Elliot was not sufficient and the further fact that an actual seriously made plan upon the part of the appellant was necessary.

In *ALPERT v. U. S.*, 12 Fed. (2d) 352 (CCA 2), cited supra, the necessity of an arrangement or plan is emphasized and again in *WELCH v. U. S.*, 220 Fed. 764 (CCA 4), it is stated:

"It appears to us an untenable proposition, when this girl went back home for a legitimate and commendable reason, because of information coming to her which was of itself ample cause and explanation of her return, that the defendant can be held to have committed the offense of which he was found guilty merely because he might have had the secret desire or intention of using her there for the gratification of his passion, although he had nothing whatever to do with her going back which was not entirely suitable and proper."

Particularly with reference to the second trip of Mrs.

Elliot this instruction was applicable and should have been given because undoubtedly the immoral relations indulged in by the parties upon Mrs. Elliot's arrival in Seattle were only incidental to her trip and the record is devoid of any inference that the purpose of appellant's bringing Mrs. Elliot out was primarily to have such relations with her. It was entirely incidental and if anything existed in the mind of the appellant concerning this phase of the case, it was merely an expectation or secret desire.

Proposed instruction number 16 covers the question of the necessity that the unlawful purpose be the primary purpose and not the secondary or incidental purpose of the trip.

In *YODER v. U. S.*, 80 Fed. (2d) 665 (CCA 10), cited *supra*, this point is covered and the court therein emphasized the necessity that if the sole purpose was legitimate, it does not violate the statute. We again quote from that case:

"... but if the sole purpose of the trip is legitimate, a purely incidental intent to have intercourse is not a federal offense."

The failure to give the above instructions was prejudicial to the appellant as such failure resulted in the jury's not being charged concerning the very material points covered by such instructions.

VII.

THE READING OF THE TESTIMONY OF THE WITNESS,
BETTY DesCORREAU, IN QUESTION AND ANSWER
FORM IN THE UNITED STATES ATTORNEY'S
CLOSING ARGUMENT WAS PREJUDICIAL

The United States attorney in his closing argument read to the jury in question and answer form the testimony of the witness, Betty DesCorreau (R. 256, 257, 258). It is, as heretofore stated, the contention of the appellant that this action on the part of the counsel was prejudicial to the appellant's having a fair trial due to the fact that it unduly emphasized the testimony of this witness and the practical effect of it was to permit this witness to testify twice before the jury. The nature of the testimony itself, the very apparent bias and prejudice of this witness when coupled with the reading of her testimony in argument clearly prevented the jury from weighing this witness' testimony in its proper perspective. We admit that the permitting of such action by the trial court is a matter within the court's discretion in the ordinary case but in view of the nature of the testimony of this witness, it is submitted that in this instance it was clearly an abuse of discretion.

In conclusion the judgment and conviction and sentence which was entered by the District Court should be

reversed or in the alternative, the appellant should be granted a new trial.

Respectfully submitted,

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No. 12878

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

THOMAS T. CHAMALES, Jr.,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

No. 12878

On Appeal from the District Court of the United
States for the Eastern District of Washington

BRIEF FOR THE APPELLEE

HARVEY ERICKSON,
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Attorneys for Appellee



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BRIEF FOR THE APPELLEE

STATEMENT OF JURISDICTION

The appellant was found guilty on Count 2 of an Amended Infomation (R. 4) by a jury impaneled in the United States District Court for the Eastern District of Washington at Spokane. Appellant was acquitted as to Count 1 of said Information. Both counts charged violation of the White Slave Traffic Act, 18 U.S.C. 2421. On January 24, 1951 the District

Judge denied appellant's motion for new trial (R. 11). Appellant filed his Notice of Appeal on January 22, 1951 (R. 13). This Court has jurisdiction of this appeal under Sec. 1291 of revised Title 28, U.S.C.

ADDITIONAL STATEMENT OF THE CASE

The appellant, Thomas T. Chamales, Jr., was found guilty by jury in the Eastern District of Washington, Northern Division at Spokane, of Count 2 of an Amended Information. Count 2 alleged a violation of the White Slave Traffic Act, 18 U.S.C. 2421, and read as follows:

"That Thomas T. Chamales, Jr., on or about the 14th day of August, 1949, did transport and cause to be transported, and aid and assist in transporting Elaine Elliot from Chicago, Illinois, to Yakima, in the Southern Division of the Eastern District of Washington, for the purpose of prostitution, debauchery and other immoral purposes."

The evidence produced at the trial by the Government was as follows: Elaine Elliot, 19 years old, a free-lance model living in Chicago, Illinois, first met the appellant Thomas T. Chamales, Jr. in Chicago approximately six weeks before Easter in 1949 (R. 34). At the time of the first meeting both appellant and Mrs. Elliot were in the process of securing divorces from their respective spouses. For a period of approximately two weeks after the first meeting appellant wined, dined, and generally feted Mrs. Elliot with the result that she fell in love with him (R. 37). During this period appellant informed Mrs. Elliot that he was operating the Commercial Hotel in Yakima, Washington for his father and he further informed her that he had the franchise for the construction of Lustron homes in the State of Washington (R. 35). When Mrs. Elliot informed appellant that she was

contemplating taking a night check room job in Chicago, he suggested that she accept a position as either his secretary or as hostess at the Commercial Hotel in Yakima (R. 36). Mrs. Elliot agreed to accept employment from appellant and agreed to accompany him to Yakima for the purpose of entering into such employment. Appellant purchased railroad tickets in Chicago for their transportation to Yakima, Washington. He purchased the tickets from his own funds (R. 38) and made arrangements for train accommodations to Yakima.

Appellant and Mrs. Elliot boarded the Northern Pacific train in Chicago pursuant to arrangements made by appellant. When Mrs. Elliot arrived on board the train she found that appellant has arranged for a single bedroom compartment for the two on the trip (R. 38). She objected to appellant to the arrangements made for the single compartment but finally agreed to accompany him on that basis (R. 38, 39). During the several day period en route to Yakima, Mrs. Elliot and appellant had intercourse on the train (R. 38). Mrs. Elliot testified that they arrived in Yakima in early March of 1949 and that she was immediately taken from the train to appellant's suite at the Commercial Hotel in Yakima. Mrs. Elliot lived with appellant in his suite at the Commercial Hotel for a period of approximately one week after their arrival in Yakima and during this period she had regular intercourse with appellant. At the end of the first week Mrs. Elliot demanded an extra room for herself and for the subsequent two week period so occupied her own room at the Commercial Hotel, again having intercourse with appellant during this period (R. 38-41).

During the three week period which Mrs. Elliot

spent in Yakima prior to returning to Chicago, appellant made no attempt to offer her employment and in fact admitted for the first time that he had nothing to do with the employment of a hostess at the Commercial Hotel since the dining room was leased to others (R. 41). She requested the position of switchboard operator at the hotel and he refused to permit her this job on the basis that she "wasn't dependable enough". Appellant also stated for the first time that she did not have the education or capability to do the secretarial work (R. 41). Accordingly, at the end of the three week period, Mrs. Elliot returned to Chicago and her transportation was paid for by appellant. The foregoing evidence was submitted on Count 1 of the Amended Information on which the jury found the appellant not guilty.

On Count 2 of the Amended Information, of which the appellant was found guilty, the following evidence was submitted: During the period of Mrs. Elliot's return to Chicago, between Easter, 1949 and the first part of August, 1949, appellant and Mrs. Elliot corresponded frequently by phone, she from Chicago to him at Yakima (R. 43). On or about August 10 to 12, 1949, appellant informed her by phone that he had arranged transportation for her back to Yakima if she would be willing to work for him (R. 45, 46). When she assured him she was willing to return to Yakima and enter his employment there, appellant informed her that he would send \$125.00 to Mrs. Elliot's roommate, Marge Mahoney, to be used for the purpose of that transportation (R. 46). Accordingly, on August 13, appellant, using the assumed name of Tom Chambers, sent the sum of \$125.00 by Western Union money order to Marge Mahoney at Chicago (R. 47,48, Pl. Ex. 11 and 12). The following morning Mrs. Elliot, together with Miss

Mahoney, received the \$125.00 money order at the Western Union office in Chicago and later that day she took the United Airlines plane to Seattle, Washington where, by previous agreement, she was to meet appellant (R. 47). She arrived in Seattle, Washington on Sunday, August 14, 1949. She went to the Olympic Hotel from the airport to meet appellant who had agreed to have a room reserved for her there under the name of Elaine Palmer (R. 48). Not being able to locate appellant and finding that no such reservation had been made at said hotel, Mrs. Elliot then registered under her true name of Elaine Elliot at the Earl Hotel in Seattle (R. 48). About 8:30 or 9:00 p.m. that evening appellant called from the lobby and went up to her room. He was very affectionate toward her and told her that he had plans for her future. When she inquired as to the nature of these plans he advised her that he was going to "put you into a joint to work". When she inquired as to what he meant by a "joint", he gave her no immediate explanation (R. 49, 50).

Appellant stayed with Mrs. Elliot in her room at the Earl Hotel that night. The following morning at breakfast she again questioned him as to what he meant by a "joint", and he answered that he had in mind a house of prostitution. Appellant told her that he had plans of placing her in one house of prostitution for four weeks and in a second house for an additional four weeks, by which time she would have had sufficient experience to manage a house of prostitution in Texas which appellant said he planned on opening (R. 50, 51). Mrs. Elliot demurred strenuously to any such employment and the proposal was temporarily dropped by appellant.

That afternoon appellant and a friend of his, by the

name of Tex Reed, and Mrs. Elliot drove to Yakima from Seattle by way of Cle Elum. They stopped at Cle Elum to pick up a girl by the name of Vicki Reed, who was Tex Reed's wife, and they arrived at Yakima that evening (R. 51, 52). At Yakima appellant took Mrs. Elliot by back door into the Commercial Hotel to his room and there gave her a phenobarbital tablet to quiet her hysterical condition (R. 52). The next day appellant drove Mrs. Elliot to the Rest Haven Motel on the outskirts of Yakima where appellant registered under the name of Richard Sullivan (R. 53, Pl. Ex. 15). That night at the Rest Haven Motel appellant again discussed the plans of prostitution with Mrs. Elliot and again she vehemently objected to such employment (R. 53, 54). He used very profane language at her and slapped her across the face.

The following day appellant drove Mrs. Elliot back to Seattle where he advised her to check out of the Earl Hotel and to check into the Wilhard Hotel under the name of Elaine Palmer (R. 55). Appellant registered Mrs. Elliot at the Wilhard Hotel as Elaine Palmer (R. 55). That evening appellant again brought up the subject of prostitution and again she remonstrated with him (R. 56). Several days after their arrival in Seattle, Mrs. Elliot finally and definitely informed appellant that she wanted no part in any of the proposals that appellant was making to her and that she desired forthwith to return to Chicago (R. 56, 57). That afternoon Mrs. Elliot reported the matter to the Federal Bureau of Investigation in Seattle (R. 57).

A most important witness for the Government in the prosecution of this case was one Betty DesCorreau who testified that she met appellant in Seattle, Washington just a few days prior to the date Mrs. Elliot

was to arrive by plane from Chicago. Miss DesCorreau testified that appellant informed her that he had great plans for the girl coming in by plane "from California". He admitted to Miss DesCorreau that he himself was a pimp and that he intended to place the girl arriving by plane in a house of prostitution for the next several months in order that she might gain the necessary experience to operate a house of prostitution (R. 165-167). Miss DesCorreau's testimony was as follows:

"And he said the first thing he was going to do was to slap her in the face to show her who was boss, and then he said he was going to put her in a low house of prostitution, and after that he was going to put her in a lower one so she would get to know the business, but he said after about six months that he would put her up in business of her own.

"He told me that first he treats them very wonderfully, sends them flowers and takes them out and all sorts of intentions, and then they had this thing that's planned where he has an apartment, maybe, or something like a house, and he would have several good-looking friends in where they would ignore the girl when she came in, when she is used to all sorts of attention; she is probably a beautiful girl to begin with, or pretty, until the time when he would — the expression he used was get his hook in their belly, and they would do whatever he wanted them to do." (R. 166, 167).

Several days later appellant, accompanied by Tex Reed and a young lady who Miss DesCorreau identified as Elaine Elliot, drove over to Miss DesCorreau's apartment in Seattle and appellant there pointed out to her that the girl in the automobile, Elaine Elliot, was the girl of whom he had spoken earlier as the girl who had come by plane "from California" and

for whom he had plans (R. 170, 171). Appellant admonished her before he left the apartment that if he got back to Yakima and heard anything he had said repeated, he would "come back and knock you on your fanny" (R. 171, 172).

The testimony of Mrs. Elliot was substantiated in the following additional particulars by the Government. John W. Worsham, Special Agent of the Federal Bureau of Investigation, testified that he had discussed the matter of the transportation of Mrs. Elliot with appellant on March 6, 1950. At that time appellant voluntarily admitted that Mrs. Elliot had made two trips to Yakima in 1949; that he had had sexual intercourse with her during both trips and at Yakima; that he had sent a Western Union money order for Mrs. Elliot in the sum of \$125.00 to Marge Mahoney in Chicago in August, 1949 from Tacoma, Washington under an assumed name; that he had registered at the Rest Haven Motel under an assumed name with Mrs. Elliot for the reason that he "never used his correct name while shacking up"; and that he had registered Mrs. Elliot at the Wilhard Hotel in Seattle under the name of Elaine Palmer, but that appellant did deny that either transportation was for the purpose of prostitution or immorality (R. 132-139).

Mr. Wilbur R. Green called as a witness for the Government identified the original Western Union money order application and money order draft sent to Marge Mahoney at Chicago by a Tom Chambers at Tacoma (R. 145, 146). The original application for money order and the original money order itself were admitted as Plaintiff's Exhibits 11 and 12 (R. 148).

Marge G. Mahoney called as a witness for the Gov-

ernment testified as to the receipt of said money order in Chicago (R. 147, 148).

Mr. A. L. Richmond corroborated the testimony of Mrs. Elliot by identifying and producing the registration for room 235 for the night of August 17, 1949 at the Wilhard Hotel, Seattle, wherein Mrs. Elliot was registered under the name of Mrs. Elaine Palmer (R. 152, Pl. Ex. 14).

Mr. Tom Dawson on behalf of the Government corroborated the testimony of Mrs. Elliot by identifying and producing the registration of the Rest Haven Motel in Yakima, Washington for the evening of August 16, 1949, showing the registration for that night by one R. A. Sullivan (R. 154, 155) and the registration card was admitted in evidence as Plaintiff's Exhibit 15.

*Answer and Argument to Appellant's
Specification of Error 1.*

The appellant contends, as his first specification of error, that his Motion for Acquittal should have been granted, this on the basis that there was no credible evidence from which the jury could have inferred an intent to transport Elaine Elliot from Chicago, Illinois to Yakima, Washington on or about the 14th day of August, 1949 for purposes of prostitution, debauchery or other immoral purposes.

In order to constitute a violation of the White Slave Traffic Act, Sec. 2421, Title 18, U.S.C., it is essential that the interstate transportation have for its object or be the means of effecting or facilitating the prescribed activities. *Hansen v. Haff*, 291 U. S. 559, 563. An intention that the woman shall engage in the conduct outlawed by the Act must be found to exist before

the conclusion of the interstate journey and must be the dominant motive of such interstate movement. And the transportation must be designed to bring about such result. *Mortensen v. United States*, 322 U. S. 369, 374.

Examining the evidence in the case as concerns the second count upon which the appellant was found guilty, in the light of the above principles, we find the following: Appellant wired money to Chicago from Tacoma under an assumed name. He sent this money not to Mrs. Elliot but to Marge Mahoney. The money was to be used for the transportation of Mrs. Elliot by plane to Seattle. The first night in Seattle, as testified to by Mrs. Elliot, appellant indicated what he had in mind for her, and the following morning clarified any question of his intentions by boldly stating to her that she was to be placed by him in a brothel. A night or two later the appellant registered himself and Mrs. Elliot at a motel near Yakima under an assumed name. The following night appellant registered Mrs. Elliot at the Wilhard Hotel in Seattle under the name of Elaine Palmer. The Government's witness, Betty DesCorreau, testified to her conversation with appellant a few nights before Mrs. Elliot was to arrive in Seattle by plane. She testified that appellant told her of the plans he had for placing the girl coming in by plane in a house of prostitution; that appellant was himself a pimp; that Mrs. Elliot was later pointed out to Miss DesCorreau by appellant himself as the girl who had arrived by plane and concerning whom he had spoken as the subject of his despicable plans.

It is patently apparent from the above that the only motive and the dominant purpose of the transportation of Mrs. Elliot from Chicago, Illinois to Yaki-

ma, Washington, as charged in the second count, was to place Mrs. Elliot in a house of prostitution. The appellant argues that his true purpose was to bring her to Seattle and then to Yakima for the purpose of advising her to stop pursuing him. The appellant's explanation was so naive as to be childish. The jury had the right to disregard the explanation given by appellant and accept the proof adduced by the Government.

Appellant also attempts here to argue the credibility of the witness Betty DesCorreau. The rule is, as we understand it, that the Court will not weigh the evidence by determining that the testimony of one witness was so completely discredited as to render it unworthy of belief. *Lawrence v. United States*, 162 F. (2d) 156 158 (CCA 9). The jury evidently accepted the testimony of Betty DesCorreau. This was in their province.

Viewing the evidence in this case in a light most favorable to the Government, it is apparent that there was ample evidence for the jury to determine that the dominant purpose and motive of the interstate transportation contained in the second count of the Amended Information was for Mrs. Elliot to engage in conduct outlawed by the White Slave Traffic Act.

*Answer and Argument to Appellant's
Specification of Error 2.*

Appellant assigns as error the fact that his cross-examination of the Government's principle witness, Mrs. Elaine Elliot, was unduly restricted, and that such restriction prevented the appellant from having a fair trial. The crux of the alleged error is that the Trial Court refused to permit appellant's counsel to extensively pursue the cross-examination of the wit-

ness Elaine Elliot on collateral matters consisting of the previous loves, possible moral delinquency, and alleged false testimony given by her in a previous divorce action, for the presumed purpose of affecting her credibility.

The rule as to the admissibility of collateral matters for the purpose of impeaching the credibility of a witness is well stated in *Simon v. United States*, 123 F. (2d) 80, c.d. 314 U. S. 694, at page 85, as follows:

“The rule is that for the purpose of impeaching the credibility of a witness he may be questioned as to misconduct, even as to collateral matters, which has a tendency to show his lack of honesty or truthfulness; *the qualification of the rule being that the party questioning him is bound by his answers and may not contradict him with regard thereto.* See Wigmore on Evidence, (2d Ed.) Vol. 2, paragraph 982 et seq.; Greenleaf on Evidence, Lewis’ Edition, paragraph 459, 28 R.C.L. 607; *Tla-koo-yel-lee v. United States*, 167 U. S. 274, 277. It is said that it was within the discretion of the trial judge whether questions would be permitted as to acts of misconduct affecting credibility. We think, however, that the matter resting within the discretion of the judge is merely to the extent to which such examination may be pursued.”

In *State v. Johnson*, 192 Wash. 467, 73 P. (2d) 1342, the Washington State Supreme Court announced the rule at page 471-2:

“The rule is firmly established in this state that a witness cannot be impeached by showing the falsity of his testimony concerning facts collateral to the issue. In such matters, a party cross-examining the witness is concluded by the answers given.

“The test as to whether a matter is material or collateral, within the meaning of the rule, is

whether the cross-examining party is entitled to prove it in support of his case."

In *United States v. Sager*, 49 F. (2d) 725 at page 730:

"The rule that any witness may be asked concerning any vicious or criminal act of his past life is limited. The witness may be asked about any specific incident, but his answers thereto are final and conclusive except only where a judgment of conviction of crime has been shown."

Turning to the case at bar, it should be pointed out to this Court that appellant was not prevented from cross-examining Mrs. Elliot with regard to past statements or past conduct inconsistent with her testimony in this case, *but the Court ruled that appellant would be bound by her answers*. The Trial Court's ruling in this regard was as follows:

"* * * I think, Mr. Olson, that you should be permitted to cross-examine her (Mrs. Elliot) with reference to any inconsistent statements, or statements inconsistent with her present testimony, or past conduct inconsistent with her present testimony, and specifically I think you may be permitted to ask her if she didn't testify that the injury she received, or I mean testify in a prior case, in her divorce action, that the injury she received was received from her former husband rather than from this defendant, and also I think you should be permitted to ask her if she weren't at some time only a short time or two or three months prior to meeting the defendant in love with some other man, and inquire on that line, although I think you'd be bound by her answers, and at the present time at any rate I am not going to permit you to then attempt to contradict whatever she may say by putting in these documents. Do you get what I have in mind?"

Mr. Olson: Yes, I do, your Honor." (R. 118)

It is apparent that appellant's proposed cross-exam-

ination of Mrs. Elaine Elliot on matters concerning the prior love life of the witness was purely collateral since appellant was not entitled to prove it in support of his case as that rule is laid down in *State v. Johnson*, supra. It is not impossible as remarked by the Trial Court, for a woman to fall in and out of love in a six month period. In any case whether Mrs. Elaine Elliot was actually in love with appellant or not has no materiality in this case. Appellant was permitted, however, to ask the witness whether she was in love with another some months before she met appellant. Her answer was binding upon appellant, and it would have been most improper to have permitted him to pursue such a collateral matter further. The Trial Judge acted within the scope of his discretion.

The above is also true of the prior acts of moral delinquency on the part of Mrs. Elliot as claimed by appellant. The sole purpose of the appellant in pursuing this line of questioning was to shame and embarrass the witness. These matters were again collateral under the rule of the *State v. Johnson*, supra, decision. The Court properly permitted the asking of the question, and appellant was bound by her answer. Again the matter of chastity or lack of chastity of the witness Elaine Elliot has only a remote connection with the case — the gist of the criminal action being the interstate transportation of a woman, be she a prostitute or a virgin, for the unlawful purpose prohibited by the White Slave Traffic Act.

Finally, as to the alleged inconsistent statements or testimony made by the witness in a previous divorce action, appellant was again permitted to question her and appellant was bound by her answers. The Court acted within its discretion. Any other disposition would have permitted the rehashing of the entire

previous divorce action and would have served only to lead the jury away on a tangent from the trial of Thomas T. Chamales, Jr.

It is submitted that no error was committed by restricting the cross-examination of Mrs. Elliot on such entirely collateral matters nor by refusing to permit appellant to contradict by use of the offered identifications.

*Answer and Argument to Appellant's
Specification of Error 3.*

The appellant claims prejudicial error in that the Government attorney asked the appellant upon cross-examination if he knew one Tex Reed, and whether or not he had made the statement to one, Mr. Worsham of the F.B.I., that Tex Reed was a pimp and a gambler.

“Q. Didn't you tell Mr. Worsham of the F.B.I. that Tex Reed was a high class gambler and pimp?

Mr. Olson: I submit that counsel is inquiring into a collateral matter.

The Court: And he'll be bound by the answer, the same as you are.” (R. 253)

The appellant denied the statement and the inquiry ended.

The appellant had testified on direct examination that he never had any connection with houses of prostitution, or with the girls so employed (R. 244). He also testified on direct examination as to the automobile trip from Seattle to Yakima when he and Mrs. Elliot rode with Tex Reed and picked up Mrs. Reed en route at Cle Elum, Washington (R. 244, 245).

John W. Worsham, the F.B.I. agent, had earlier

testified that the appellant had admitted to him that Mrs. Reed was picked up by them at a house of prostitution in Cle Elum (R. 138).

In view of the above it was proper and material for the Government to cross-examine the appellant as to the identity of Tex Reed since appellant opened up the matter by testifying himself concerning Mr. Reed.

In any case, even if the matter be considered collateral, the matter was dropped immediately upon appellant's denial of the statement.

*Answer and Argument to Appellant's
Specification of Error 4.*

Appellant predicates as error the reception of admissions made by the appellant to John W. Worsham, Special Agent of the Federal Bureau of Investigation, prior to his arrest. As admitted by appellant in his brief (page 39), the admissions were made on March 6, 1950. The appellant was not arrested until March 9, 1950.

Appellant does not urge that the admissions were not voluntarily made. Instead appellant contends that under the rule laid down in *McNabb v. United States*, 318 U. S. 332, and *Anderson v. United States*, 318 U. S. 350, admissions made prior to arraignment before the United States Commissioner are inadmissible.

The weakness of appellant's position is that the rule in the above cases is predicated upon an admission or confession taken between arrest and arraignment. We know of no case wherein a voluntary confession or admission of a defendant has been refused in evidence where taken *prior to arrest*.

*Answer and Argument to Appellant's
Specification of Error 5.*

Appellant assigns as error the refusal of the Trial Court to permit the appellant to testify as to medical and psychiatric treatments taken by him since his discharge from the armed forces.

Appellant admits in his brief (page 42), that it is not contended that appellant was insane at the time of the commission of the offenses charged, and, further, that the offered testimony of the appellant as to medical treatments taken would not have proven insanity. Appellant took the same position during the trial of this cause (R. 218).

The test of one's mental responsibility for a criminal offense is whether he is capable of distinguishing between right and wrong at the time and with respect to the act committed. *Brewer v. Hunter*, 163 F. (2d) 341, 344.

For the purposes of conviction, there is no twilight zone between abnormality and insanity, and an offender is wholly sane or wholly insane. *Holloway v. United States*, 148 F. (2d) 665, 667, c.d. 334 U. S. 852.

The Trial Court allowed much latitude to appellant to testify as to his physical condition after his discharge from the service in 1945 to the date of these offenses (R. 216-218). The appellant was also permitted to testify that he secured treatments from a Doctor Seaman in Evanston, Illinois, from the time of his discharge until about three months prior to his testimony (R. 218) for a nervous condition and periodic headaches.

There was nothing in the nature of his illness as would in any manner affect his ability to distinguish

between right and wrong, and appellant does not so contend. The appellant testified fully and intelligently in this case. It is submitted that the Trial Court did not commit error in refusing to permit testimony as to additional treatments taken by appellant where mental irresponsibility was not contended.

*Answer and Argument to Appellant's
Specification of Error 6.*

Appellant predicates error on the refusal of the Trial Court to give appellant's Requested Instructions No. 9, 11 and 16.

With reference to appellant's Requested Instruction No. 9, the Trial Court fully and completely instructed the jury to the effect that they must find an intent on the part of the appellant to have the woman transported engage in the outlawed conduct, and that that intent must be found to exist at the time of the interstate transportation (R. 263). This instruction was taken from *Mortensen v. United States*, 322 U. S. 369, 374. Appellant's precise objection to the above instruction is that it states that the intent to transport "must be found to exist at the time the transportation took place", while in the *Mortensen* case, the Court used the words "must be found to exist before the conclusion of the interstate journey". We submit that this is a distinction without a difference.

Concerning appellant's Requested Instructions 11 and 16, the Trial Court fully instructed that in order to find appellant guilty of the unlawful interstate transportation it was required that they find that the dominant object of the transportation be for the purposes outlawed by the White Slave Traffic Act (R. 263-265).

It is submitted that the Trial Court's instructions fully protected the appellant and that said instructions were in accordance with *Mortensen v. United States*, *supra*, and *Athanasaw v. United States*, 227 U. S. 326. See also *Tedesco v. United States*, 118 F. (2d) 737 (CCA 9).

*Answer and Argument to Appellant's
Specification of Error 7.*

Appellant assigns as his last specification of error the fact that the United States Attorney read to the jury in question and answer form the testimony of Betty DesCorreau, and that an undue emphasis on her testimony resulted.

It is not contended that the United States Attorney did not correctly read the stenographer's record of the testimony of the witness. And it is not denied that the United States Attorney prefaced his reading of such testimony by stating, "And my recollection of her testimony is as follows" (R. 256).

The point raised by appellant is disposed of in the case of *United States v. Chiarella et al*, 184 F. (2d) 903 at page 908:

"Chiarella's Point II is an objection that the prosecutor in his address to the jury read as testimony from a paper which he held in his hand. That paper was a stenographic record of the *actual testimony*; and no more need be said."

It is respectfully submitted that the verdict of the jury and the judgment of the Court is in all respects sound and proper and should be affirmed.

Respectfully submitted,

HARVEY ERICKSON,
United States Attorney

FRANK R. FREEMAN,
Assistant United States Attorney
Attorneys for Appellee

No. 12878

IN THE

**United States Circuit Court
of Appeals**

FOR THE NINTH CIRCUIT

THOMAS T. CHAMALES, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

APPELLANT'S REPLY BRIEF

FILED

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REPLY TO APPELLEE'S ANSWER AND ARGUMENT TO SPECIFICATION OF ERROR 2

This reply brief will be limited to a brief discussion of appellee's argument in answer to the second specification of error. It is apparent that appellee at least partially has misconstrued appellant's argument with reference to the restriction of the cross examination of Mrs. Elliott by the court. On page 13 of the answering brief, it is stated in substance that the appellant was not prevented from cross examining Mrs. Elliott with regard to past statements or past conduct inconsistent with her testimony in the case of bar and that the court's ruling was that appellant would be bound by her answers. It is the position of appellant that as shown by the court's ruling (R118), which ruling is also quoted on page 13 of appellee's brief, that the court limited the cross examination of Mrs. Elliott to an extremely narrow phase of the inquiry. It will be noted that the court specifically stated that appellant would be permitted to ask Mrs. Elliott if she were not, at some time two or three months prior to her meeting the appellant, in love with some other man. This extremely narrow limitation for all practical purposes was a prejudicial denial of appellant's right of cross examination. So that the matter may be more fully before the court, we herewith set forth appellant's offer of proof as well as the court's ruling:

"Mr. Olson: Your Honor, I think to have the matter

squarely before the court I might first state what we offer to show.

"The Court: Yes. Also I don't think there has ever been any formal offer of the documents that are the main subject of discussion here.

"Mr. Olson: Then I do, your Honor, offer in evidence defendant's identifications 5, 6 and 7, and the defendant offers to prove by the cross examination of Elaine Elliott that shortly prior to meeting Mr. Chamales that she took a trip, while she was married to Wright Elliott, that she took a trip with her brother-in-law, Bobbie Elliott, from Chicago to Tulsa and return through Pine Bluffs, Arkansas, back to Little Rock. We offer to show that in her divorce proceeding—

"The Court: Pardon me; before you leave that subject I wonder if you couldn't make the time element a little more specific? You say shortly before; that might vary over a period of weeks or months, depending on your idea of shortly.

"Mr. Olson: That the trip was taken during September and October of 1948.

"The Court: All right.

"Mr. Olson: That the witness Elaine Elliott in her divorce proceedings, by way of a verified complaint, swore under oath, the custody of her child in the divorce proceedings being at stake, that she swore under oath in her pleadings that that trip was instigated at the suggestion of her husband Wright Elliott for the purpose of indicating adultery with his brother Bobbie Elliott, and that the entire matter was a conspiracy between her then husband Wright Elliott and his brother against her; that throughout the entire trip she had not stayed or slept with Bobbie Elliott in the same bed or cabin, and that the entire relationship was entirely proper between them. I offer to show that in her divorce proceedings she was interrogated under

oath and testified substantially to those facts, that while the trip was taken it was not at her instigation or her request, but solely because her husband and brother-in-law had had a conspiracy against her. We then offer to show by the defendant's identifications 5, 6 and 7, and by the witness' testimony on cross-examination, which we believe she will be forced to admit, that those sworn statements in her complaint, her counter-complaint, as well as the sworn statements made in the divorce proceedings, were false, and that she knew them to be false at the time that (111) she made the statements. We submit that the records which we have referred to, the divorce complaint, or her counter-complaint, which I have not yet, your Honor had identified or offered in evidence but which I now offer or I have here and I'm willing to offer, a photostatic copy of her countersuit, in which she made the allegations that I've referred to, we submit that that, together with the record of the testimony, together with these letters, are admissible for the following purposes:—

“The Court: Pardon me; before you go into that I wonder if it wouldn't make a better record if we have any documents you refer to identified so that they will be available as a part of the record.

(Whereupon, photostatic copy of answer and counter-complaint were marked defendant's Exhibit No. 3 for identification).

“The Court: Now just state briefly what that is.

“Mr. Olson: Your Honor, in the Chicago practice, I'm not entirely familiar with it, but what it is, the one document is labeled an answer to the complaint, and then apparently companion to it is what is labeled a counter-complaint for divorce. We would file an answer and cross-complaint, but one is not complete without the other.

"The Court: It's understood that you've offered or (112) are offering identification 8 also.

"Mr. Olson: Yes, we offer it.

(Argument of counsel).

(Whereupon, two auto court registration cards were marked Defendant's Exhibits No. 9 and 10 for identification).

"Mr. Olson: We also offer in evidence defendant's identification 9, which is a registration at the Sycamore Court at Little Rock, Arkansas, under date of October 19, 1948 during this trip, the registration 'Mr. and Mrs. B. Elliott' and defendant's identification 10, being a guest registration dated September 15, 1948, also during this trip, a registration at the Anchor Court in Laurel, Mississippi, and her record will show that this looks like Bobbie Elliott's, that's the brother-in-law, signature.

(Argument of Counsel).

"The Court: For the present, at any rate, I'll deny the offer of defendant's identifications 5 and 10, and the record may show an exception for the defendant. Mr. Freeman, Mrs. Elliott will be available here throughout the trial, I presume?

"Mr. Freeman: If it's so ordered, yes, your Honor.

"The Court: Well, I think she should be kept until the conclusion of the government's case. What I have in (113) mind, I have my law clerk checking up for me on this question of the admissibility of the proffered evidence, and if I should conclude that my ruling hasn't been correct I would like to be in a position to have Mrs. Elliott recalled and the defense given an opportunity to cross-examine her further. At the present time, however, the ruling will be that the offers are

rejected. I think, Mr. Olson, that you should be permitted to cross-examine her with reference to any inconsistent statements, or statements inconsistent with her present testimony, or past conduct inconsistent with her present testimony, and specifically I think you may be permitted to ask her if she didn't testify that the injury she received, or I mean testify in a prior case, in her divorce action, that the injury she received was received from her former husband rather than from this defendant, and also I think you should be permitted to ask her if she weren't at some time only a short time or two or three months prior to meeting the defendant, in love with some other man, and inquire on that line, although I think you'd be bound by her answer, and at the present time at any rate I'm not going to permit you to then attempt to contradict whatever she may say by putting in these documents. Do you get what I have in mind?

"Mr. Olson: Yes, I do, your Honor. (114).

"The Court: All right, you may call in the jury, then."

As can readily be seen from the examination of the record as above set forth, appellant not only offered the identifications but he also offered to prove by cross-examination of Mrs. Elliott that she committed perjury in her divorce proceedings with reference to her conduct with her then brother-in-law, Bobbie Elliott. Certainly, appellant should have been allowed to ask the necessary background questions to permit the appellant to question the witness specifically as to whether her sworn testimony in the divorce proceeding was actually true. The jury was certainly entitled to have before them the facts bearing upon the character and credibility of the witness and to place the witness in her proper setting. Without this back-

ground of a reasonable cross-examination, the jury could not fairly appraise the weight of her testimony. *Tla-Koo-Yel-Lee v. U. S.*, 42 L. Ed. 166, 167 U. S. 274. *Alford vs. U. S.*, 75 L. Ed. 624, 282 U. S. 687.

We cannot overemphasize the fact that a denial of a cross-examination upon the points covered in appellant's offer of proof in effect, amounted to a rejection of appellant's right to question the credibility and the reliability of the witness that was seeking to convict him of this crime.

It is submitted that regardless of the question concerning the admissability of the proffered documents, the right to a reasonable cross-examination should in any event have been recognized.

Respectfully submitted,

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